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ARTICLES

COMMENTS

THE ORIGINAL UNDERSTANDING OF THE INDIAN COMMERCE CLAUSE

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ABSTRACT

The United States Congress claims plenary and exclusive power over federal affairs with the Indian tribes, based primarily on the Constitution's Indian Commerce Clause. This article is the first comprehensive analysis of the original meaning of, and understanding behind, that constitutional provision. The author concludes that, as originally understood, congressional power over the tribes was to be neither plenary nor exclusive.

"[A]s exception strengthens the force of a law in cases not excepted; so enumeration weakens it in cases not enumerated."

– Sir Francis Bacon[1]

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† Professor of Law, The University of Montana. The author would like to thank Professors Ray Cross, Maylinn Smith, and Elizabeth Kronk for the guidance they provided; The University of Montana School of Law for financial support; Elizabeth J. Natelson for editing; Sara Tappen, UM School of Law Class of '08, for her research assistance; and Geri Fox for secretarial assistance.

All translations from Latin to English in this Article are by the author, and all opinions and errors are his sole responsibility.

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2. *Bibliographical Note*: This footnote collects alphabetically the secondary sources cited more than once in this Article. The sources and short form citations used are as follows:

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1. Justifying Plenary Authority by Extra-Constitutional Means

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For many years, Congress has claimed, and the Supreme Court has conceded,[3] a plenary power over American Indian tribes.[4] As is true of so much else in Indian law,[5] the constitutional basis of this power is unclear.[6]

Courts and commentators have offered a variety of justifications for the plenary congressional power theory, all defective in various ways. One such justification is the doctrine of inherent sovereign authority: that federal control over Indian affairs is inherent in the nature of federal sovereignty.[7] The idea is that the British Crown transmitted extra-constitutional sovereign authority to the Continental Congress, which then passed it to the Confederation Congress, which in turn conveyed it to the federal government.[8]

The Supreme Court has acknowledged the theory, but only rarely and in limited respects. Dicta by Chief Justice Marshall are sometimes cited as recognizing it,[9] but in fact they do not.[10] A passage in Chief Justice Taney's opinion in *Dred Scott v. Sandford*[11] suggests an inherent sovereignty theory,[12] but later in the opinion Taney made it clear that he was invoking an enumerated power.[13] *United States v. Kagama*,[14] decided in 1886, did recognize unenumerated federal power over Indian affairs, but the Court's justification was Indian dependency on the fed-

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3. *See, e.g.*, United States v. Lara, 541 U.S. 193, 200 (2004); United States v. Wheeler, 435 U.S. 313, 319 (1978) ("Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government."); Williams v. Lee, 358 U.S. 217, 220 (1959); United States v. Kagama, 118 U.S. 375, 379 (1886); *see also* PRICE & CLINTON, *supra* note 2, at 132-35 (discussing the plenary power doctrine); PRUCHA, *supra* note 2, at 51 (discussing congressional claims of plenary power); Savage, *supra* note 2, at 61 ("Congress enjoys a plenary power over Native Americans . . . .").

4. *See* BARSH & HENDERSON, *supra* note 2, at 62-84, 112-34 (discussing the rise and development of the plenary power doctrine).

5. That Indian law is chaotic seems to be one of the few points of agreement among commentators on the subject. Prakash, *Fungibility*, *supra* note 2, at 1074-75 (collecting sources).

6. BARSH & HENDERSON, *supra* note 2, at 137-48 (criticizing as unprincipled judicial decisions in this area); Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 43 (1996) ("The text of the Constitution lacks much of a hint of any plenary power."); Prakash, *Fungibility*, *supra* note 2, at 1079 ("[T]he Court has never explained how seemingly modest grants of authority might ever grant plenary authority over all Indian tribes.").

7. COHEN, *supra* note 2, at 397-98 (discussing the theory); *see also* Fletcher, *Same-Sex Marriage*, *supra* note 2, at 65-66 (stating that federal Indian law is "derived in large part from the Indian Commerce Clause, treaties with Indian tribes, and a 'pre-constitutional' federal authority to deal with Indian tribes").

8. United States v. Curtiss-Wright, 299 U.S. 304, 315-18 (1936).

9. *E.g.*, United States v. Lara, 541 U.S. 193, 201-02 (2004) (citing Marshall's opinion for the Court in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)).

10. *See infra* notes 28-33 and accompanying text.

11. 60 U.S. (19 How.) 393 (1857).

12. *Id.* at 443-45 (taking the position that federal territories acquired after adoption of the Constitution were administrated not pursuant to the Territories and Property Clause but from a "general right of sovereignty" derived from the ability to acquire new states).

13. *Id.* at 447 (resorting to the text of the Constitution authorizing the admission of new states).

14. 118 U.S. 375 (1886).

eral government, not inherent sovereignty.[15] Seven years later, in *Fong Yue Ting v. United States*,[16] the Court discussed the concept of inherency (although outside the Indian context), but the case can be read to mean that the power under consideration was inherent in the Constitution's enumerated powers rather than in extra-constitutional sovereignty.[17]

Kansas v. Colorado (1907),[18] the Supreme Court's clearest pronouncement on inherent sovereign authority in internal affairs, actually *rejected* the doctrine. *United States v. Curtiss-Wright*[19] resuscitated it, but only for foreign affairs. In 2004, the Court suggested an application to Indian concerns, but the Court's language was neither definitive nor necessary to its decision.[20]

The Supreme Court's reluctance to fully accept inherent sovereign authority is understandable, for the doctrine is fundamentally unconvincing. It clashes with the Constitution's underlying theory of enumerated powers,[21] and would render some enumerated powers redundant.[22] Moreover, as several commentators have pointed out, its historical assumptions are flatly false:[23] As a matter of historical record, the British

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15. *Id.* at 384 ("From the [tribes'] very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.").

16. 149 U.S. 698 (1893).

17. *Id.* at 711-13 (discussing inherent power to expel aliens as part of the foreign affairs power, but also using the term "inherent" as including powers within or incident to enumerated powers).

18. 206 U.S. 46 (1907). The court stated:

> [T]he proposition that there are legislative powers affecting the nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers . . . . This natural construction of the original body of the Constitution is made absolutely certain by the *Tenth Amendment.*

Id. at 89-90.

19. 299 U.S. 304, 315-18 (1936).

20. United States v. Lara, 541 U.S. 193, 201 (2004) ("Moreover, 'at least during the first century of America's national existence . . . Indian affairs were more an aspect of military and foreign policy than a subject of domestic or municipal law.' Cohen 208 (footnotes omitted). Insofar as that is so, Congress's legislative authority would rest in part, not upon 'affirmative grants of the Constitution,' but upon the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government, namely, powers that this Court has described as 'necessary concomitants of nationality.' *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-322.").

21. *Kansas*, 206 U.S. at 89; Prakash, *Fungibility*, *supra* note 2, at 1103 ("Of course, none of these rationales will win over those who steadfastly believe that the federal government is a government of enumerated powers."). The inherent power doctrine has a few defenders. *See, e.g.*, Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 36-37 (1996). Like most other commentators, Professor Frickey does not address the Tenth Amendment, which explicitly forestalls any extra-constitutional powers in the federal government. *See infra* notes 34-36 and accompanying text.

22. Prakash, *Fungibility*, *supra* note 2, at 1105. The presumption against superfluity was accepted in the Founding Era. 19 VINER, *supra* note 2, at 548 ("It is a known rule in interpretation of statutes, that such a sense is to be made upon the whole, as that *no clause, sentence, or word shall prove superfluous, void, or insignificant*, if by any other construction they may all be made useful and pertinent.").

23. *See, e.g.*, Raoul Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1, 26-33 (1972) (pointing out that sovereign foreign affairs powers could not have been transmitted directly from the Crown to Congress because the states exercised those powers for a time);

Crown did not transfer its foreign affairs powers to the Continental Congress, but to the states.[24] The Confederation Congress did not receive its authority from the Continental Congress, but from the states.[25] The federal government did not receive its powers from the Confederation Congress, but from the people.[26]

As already observed,[27] appeals to the authority of Chief Justice John Marshall do not add to the persuasiveness of the case for inherent sovereign authority because Marshall's dicta simply do not support the doctrine. Marshall observed in *Cherokee Nation v. Georgia*[28] that the federal-tribal relationship "resembles that of a ward to his guardian."[29] But a guardianship analogy implies a restricted, fiduciary power. The Founders themselves used the fiduciary analogy to emphasize the *limited* nature of federal authority.[30] Similarly, while Marshall's dictum in *Worcester v. Georgia*[31] suggested that federal governance of Indian affairs was exclusive of the states,[32] the pronouncement was unrelated to inherent sovereign authority. Neither dictum would be particularly probative of the Constitution's original meaning in any event, since they were issued more than four decades after the Constitution's ratification.[33]

Finally, the doctrine of inherent sovereign authority is simply contradicted by the text of the Constitution. Any extra-constitutional authority inhering in the federal government in 1789 was destroyed two years

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Julius Goebel, Jr., *Constitutional History and Constitutional Law*, 38 COLUM. L. REV. 555, 571-73 (1938) (criticizing the theory as inconsistent with the Founders' rejection of the royal prerogative); David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467, 478-90 (1946) (making the same point as Berger); Charles A. Lofgren, United States v. Curtiss-Wright Export Corporation: *An Historical Reassessment*, 83 YALE. L.J. 1, 12-32 (1973) (criticizing *Curtiss-Wright* for faulty reliance on Joseph Story's *Commentaries* and other sources and for failure to recognize that before the Constitution's adoption the states had foreign affairs powers); Ramsey, *supra* note 2, at 387 (criticizing the doctrine as unhistorical).

24. MCDONALD, *supra* note 2, at 150 (pointing out that by the 1783 Treaty of Paris, the British King recognized the individual states, not Congress, as sovereign).

25. ARTS. OF CONFED. art. III ("The said States hereby severally enter into a firm league of friendship with each other . . . .").

26. U.S. CONST. pmbl. ("We the People . . . .").

27. *See supra* note 10 and accompanying text.

28. 30 U.S. (5 Pet.) 1 (1831); Clinton, *Supremacy*, *supra* note 2, at 173-74 (discussing the use of *Cherokee Nation* in *Kagama*).

29. 30 U.S. (5 Pet.) at 17. The language was dictum, for the holding of the case was to *deny* federal judicial power over a tribal challenge to a state claiming authority over that tribe. *Id.* at 20.

30. Natelson, *Public Trust*, *supra* note 2, at 1137-42 (explaining how "public trust" doctrine, invoked partly by identifying public officials as "guardians," required limitations on their authority).

31. 31 U.S. (6 Pet.) 515 (1832); *see* United States v. Lara, 541 U.S. 193, 201-02 (2004) (citing *Worcester* in conjunction with the inherent sovereign authority doctrine).

32. Marshall's statement that the Constitution conferred exclusive power over relations with all Indians was dicta; his ruling that the federal government had exclusive power over relations specifically with the Cherokees was not. *See infra* notes 75-76 and accompanying text.

33. Natelson, *Founders*, *supra* note 2 (discussing the low probative level of post-ratification evidence); *see also infra* Part IV.B. (discussing the post-ratification adoption of an Indian Intercourse Act).

later, when the Tenth Amendment[34] became effective. By its terms that Amendment precluded any federal power beyond those bestowed by the Constitution.[35] Indeed, one reason for the Amendment was precisely to re-assure Anti-Federalists who feared that the new government might claim powers beyond those enumerated.[36]

2. Justifying Plenary Authority by Constitutional Clauses

In addition to relying on the doctrine of inherent sovereign authority, apologists for plenary congressional control over Indian affairs resort to several of the Constitution's enumerated powers. These include the War Power,[37] the Executive Power,[38] the Necessary and Proper Clause,[39] the Treaty Clause,[40] the Territories and Property Clause,[41] the Indian Commerce Clause,[42] and an occasional combination of two or more of the foregoing.[43]

As foundations for plenary congressional control over Indian affairs, most of those provisions can be readily dismissed. The War Power

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34. Kansas v. Colorado, 206 U.S. 46, 89-90 (1907) (stating that the lack of any inherent sovereign authority "is made absolutely certain by the 10th Amendment"); Ramsey, *supra* note 2, at 380.

35. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

36. *See, e.g.*, *The Fallacies of the Freeman Detected by A Farmer*, PHILADELPHIA FREEMAN'S J., Apr. 1788, *reprinted in* 3 STORING, *supra* note 2, at 190 ("All the prerogatives, all the essential characteristics of sovereignty, both of the internal and external kind, are vested in the general government, and consequently the several states would not be possessed of any essential power, or effective guard of sovereignty."); *Essays of an Old Whig, Essay II*, PHILADELPHIA INDEPENDENT GAZETTER, Oct. 1787 - Feb. 1788, *reprinted in* 3 STORING, *supra* note 2, at 24 (claiming that grant of effectual sovereignty to the federal government would make it a government of uncontrolled power).

Concerns over the issue may have arisen because some "ardent nationalists" had been espousing the doctrine that the Continental and Confederation Congresses had inherent powers. MCDONALD, *supra* note 2, at 149-50.

37. PRUCHA, *supra* note 2, at 51 (calling it "national defense"); Prakash, *Fungibility*, *supra* note 2, at 1097-99 (criticizing this view).

38. Prakash, *Fungibility*, *supra* note 2, at 1099-1102 (criticizing this view).

39. *E.g.*, COHEN, *supra* note 2, at 391 (stating that the clause broadens the reach of other constitutional powers).

40. COHEN, *supra* note 2, at 393-95; PRUCHA, *supra* note 2, at 51; *see* U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . .").

41. COHEN, *supra* note 2, at 391-93; PRUCHA, *supra* note 2, at 51 (calling it the "national domain clause").

42. COHEN, *supra* note 2, at 395-97; PRUCHA, *supra* note 2, at 51; WILKINSON, *supra* note 2, at 12 n.27.

43. *E.g.*, United States v. Lara, 541 U.S. 193, 200-02 (2004) (citing the military and foreign affairs powers, the treaty power, the Indian Commerce Clause, and preconstitutional powers); David F. Forte, *Commerce with the Indian Tribes*, *in* THE HERITAGE GUIDE TO THE CONSTITUTION 107, 108 (Edwin Meese III, David F. Forte & Matthew Spalding eds., 2005) ("One can derive the plenary authority of Congress over the Indians from the Commerce Clause, the Treaty Clause . . . the Property Clause . . . and from the nature of the sovereign power of [the] federal government in relation to the Indians.").

is effective only during time of war[44] and perhaps for a short time thereafter.[45] The Executive Power is not congressional at all, and in any event is not plenary.[46] The Necessary and Proper Clause depends for its operation on other enumerated powers,[47] and, as leading Founders affirmed, is but a recital of the eighteenth-century doctrine of implied incidental powers,[48] without independent substantive force.[49] Treaties may grant substantial competence to Congress,[50] but many Indian tribes have never

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44. Prakash, *Fungibility*, *supra* note 2, at 1098 ("The mere existence of a war in the past does not sanction the indefinite existence of wartime powers.").

45. *Cf.* Woods v. Cloyd W. Miller Co., 333 U.S. 138, 147 (1948) (upholding exercise of federal power to minimize post-war disruptions).

46. Prakash, *Fungibility*, *supra* note 2, at 1099-1102 (identifying the weaknesses in the executive power as a basis for plenary congressional jurisdiction).

47. U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have Power . . . . To make all Laws which shall be necessary and proper for carrying into Execution *the foregoing Powers, and all other Powers vested by this Constitution* in the Government of the United States, or in any Department or Officer thereof.") (emphasis added).

48. *See generally* Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 CASE W. RES. L. REV. 243 (2004) (explaining how the clause and others like it were used in eighteenth century documents); Natelson, *Tempering*, *supra* note 2 (containing general discussions of the doctrine of principals and incidents and how it was embodied in the Necessary and Proper Clause).

49. On the Clause's lack of independent force, *see also* 4 ELLIOT'S DEBATES, *supra* note 2, at 141 (reporting Archibald MacLaine as making this point at the North Carolina ratifying convention); THE FEDERALIST, *supra* note 2, at 158 (No. 33, Alexander Hamilton) (stating that the Clause was "only declaratory of a truth, which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government, and vesting it with certain specified powers"); THE FEDERALIST, *supra* note 2, at 234-35 (No. 44, James Madison) ("Had the Constitution been silent on this head, there can be no doubt that all the particular powers requisite as means of executing the general powers, would have resulted to the government, by unavoidable implication.").

50. *See, e.g.*, Treaty with the Cherokee art. 9, Nov. 28, 1785, 7 Stat. 18, *reprinted in* KAPPLER, *supra* note 2, at 10 ("[T]he United States in Congress assembled shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as they think proper.").

Recent scholarship has cast doubt on whether the treaty power really gives Congress as much flexibility as the Supreme Court has claimed. *See generally* Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1 (2006) (arguing that even self-executing treaties must implement other powers in the Constitution); Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005) (concluding that Missouri v. Holland, 252 U.S. 416 (1920), was wrongly decided as a matter of text and original meaning and that, according to the original meaning, Congress may not exercise authority it would not otherwise have by passing laws under non-self-executing treaties).

Both of these articles are well-argued. It is also true, though, that during the ratification debates over the Constitution, Anti-Federalists made predictions that the treaty power could be used by the federal government to exceed its enumerated powers, such as by establishing a national religion, and, outside the limits of public trust, Natelson, *Public Trust*, *supra* note 2, at 1151-52, these representations were largely uncontested. *See, e.g.*, Hampden, PITTSBURGH GAZETTE, Feb. 16, 1788, *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 2, at 666 ("Treaties may be extended to almost every legislative object of the general government. Who is it that doth not know that by treaties in Europe the succession and constitution of many sovereign states hath been regulated."); 2 DOCUMENTARY HISTORY, *supra* note 2, at 514 (quoting Robert Whitehill) (warning at the Pennsylvania ratifying convention that "[t]reaties may be so made as to absorb the liberty of conscience, trust by jury, and all our liberties"); 4 ELLIOT'S DEBATES, *supra* note 2, at 191-92 (quoting Henry Abbott at the North Carolina ratifying convention, as stating that "[i]t is feared, by some people, that, by the power of making treaties, they might make a treaty engaging with foreign powers to adopt the Roman Catholic religion in the United States, which would prevent the people from worshipping God according to their own consciences.").

signed treaties. Indeed, no Indian treaty has been signed since 1868,[51] for in 1871 Congress announced that the federal government no longer would deal with the Natives in that way.[52] Congressional authority granted by Indian treaty is thus a tribe-by-tribe inquiry, and not a basis for plenary congressional power over all tribes.[53] Finally, the Territories and Property Clause enables Congress to adopt "needful" rules and regulations for federal lands.[54] Although this was a substantial source of congressional power over Indians when most of them lived in federal territories, this is no longer true. Today less than one percent of reservation land is titled beneficially to the federal government, and very few Indians live in federal territories.[55]

3. Justifying Plenary Authority by Trusts and Treaties

It is said that the federal government holds reservation land in trust for the various tribes.[56] If this theory is viable, then legal title to this land is federal "property" subject to congressional management under the Territories and Property Clause, and such title would give Congress at least some jurisdiction over the minority of Indians[57] who reside on reservations. But this begs the question of the source of authority for hold-

51. The list of Indian treaties appears at http://digital.library.okstate.edu/kappler/Vol2/Toc.htm.

52. 25 U.S.C.A. § 71 (2007) ("No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired."); COHEN, *supra* note 2, at 395. The decision apparently arose from the demand of the House of Representatives that it enjoy a more active role in effectuating agreements with the Indians, since appropriations frequently were necessary to carry out Indian treaties. Clinton, *Supremacy*, *supra* note 2, at 167-68; *see also* BARSH & HENDERSON, *supra* note 2, at 67-69 (discussing adoption of this legislation).

53. COHEN, *supra* note 2, at 394 (claiming that Congress may act toward the Indians in ways apparently outside its enumerated powers if acting pursuant to treaty).

54. U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."); *see also* Kleppe v. New Mexico, 426 U.S. 529, 539 (1976) (stating a broad scope for the Property Clause).

55. Chart 675, *Acreage of Indian Lands, by State*, *in* STATISTICAL RECORD OF NATIVE NORTH AMERICANS, *supra* note 2, at 1053-54 (showing in 1990 that of 56,611,426.99 acres on Indian reservations, 46,327,469.33 acres are owned by tribes, 9,862,551.18 acres are owned by individuals [presumably including private entities], and 421,296.48 acres, about 0.74% of the total, are owned by governments, presumably not all by the federal government); *see also* COHEN, *supra* note 2, at 392 (stating that Indian lands are not administered under the Property Clause); Prakash, *Fungibility*, *supra* note 2, at 1092-94 (pointing out that no tribes are located in federal territories).

56. *E.g.*, 25 U.S.C.A. § 463f (2007) (authorizing the federal government to take land for certain Indians in trust); 25 U.S.C.A. § 465 (2007) (authorizing acquisition by federal government of land for tribes).

57. Chart 150, *American Indian Population On and Off Reservations, by Selected Tribal Affiliation, 1991*, *in* STATISTICAL RECORD OF NATIVE NORTH AMERICANS, *supra* note 2, at 254-55 (showing, for selected tribes, more tribal membership residing off than on reservations); *see also* Chart 151, *American Indian Population, by Reservation and Non-Reservation States, 1960*, *id.* at 255-57 (showing with more complete – although much older – figures, more Indians in states without any reservations than in states with reservations, even though not all Indians in the latter states live on reservations).

ing reservation land in trust.[58] As already noted, pre- or extra-constitutional power is not a viable answer.[59] Nor, as originally understood, is the Territories and Property Clause, for that Clause originally granted Congress the unlimited power to *dispose* of federal lands within state boundaries, but not the unlimited capacity to *retain or acquire* such lands.[60] As for the treaty power, it happens that *not a single Indian treaty provides that the government has retained or acquired trust title to the reservation.*[61] The sole references to trust arrangements in Indian treaties are peripheral provisions, such as temporary trusts incident to sale[62] and trusts to fund Indian schools and other amenities.[63]

4. Justifying Plenary Authority by the Indian Commerce Clause

The defects in all these theories of plenary congressional power, therefore, leaves only one other justification remaining: the Indian Commerce Clause.[64]

In *Kagama*, the Supreme Court rejected the Indian Commerce Clause as a source of plenary congressional authority.[65] Since that time, however, that Clause has become "the most often cited basis for modern

58. Prakash, *Fungibility*, *supra* note 2, at 1094-95 (pointing out that justifying the trust relationship through the plenary power doctrine is a form of bootstrapping).

59. *See supra* notes 21-36 and accompanying text. For an effort to trace both the plenary power and trust doctrines to pronouncements by the Marshall court, *see* Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 654-61 (2006). The "Marshall Trilogy" consists of Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); and Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). *Id.* at 628; *see also* WILKINSON, *supra* note 2, at 78-79 ("The Marshall Trilogy legitimized these congressional activities and announced federal powers under the Indian Commerce Clause that 'comprehend all that is required' to regulate Indian affairs.").

60. Robert G. Natelson, *Federal Land Retention and the Constitution's Property Clause: The Original Understanding*, 76 U. COLO. L. REV. 327, 376-77 (2005) (concluding that it violates the original understanding of the Constitution for the federal government to hold land within the states indefinitely for unenumerated purposes); *see also* Prakash, *Fungibility*, *supra* note 2, at 1092 n.142 (collecting citations).

61. This is based on a computer search of the word "trust" in KAPPLER, *supra* note 2 (which contains all federal Indian treaties), *available at* http://digital.library.okstate.edu/search.htm.

62. *E.g.*, Treaty with the Ottawa and Chippewa art. 1, July 31, 1855, 11 Stat. 621, *reprinted in* KAPPLER, *supra* note 2, at 725, 727 (authorizing trust of land title for ten years after land sales); Treaty With the Potawatomi art. 5, Nov. 15, 1861, 12 Stat. 1191, *reprinted in* KAPPLER, *supra* note 2, at 824, 826 (creating trust for funds from land sale).

63. Treaty with the Osage art. 2, Sept. 29, 1865, 14 Stat. 687, *reprinted in* KAPPLER, *supra* note 2, at 878, 879 (indicating proceeds of land sales to be held in trust "for building houses, purchasing agricultural implements and stock animals, and for the employment of a physician and mechanics, and for providing such other necessary aid as will enable said Indians to commence agricultural pursuits under favorable circumstances"); Treaty with the Potawatomi art. 6, Nov. 15, 1861, 12 Stat. 1191, *reprinted in* KAPPLER, *supra* note 2, at 824, 827 (creating trust for church and school).

64. *See, e.g.*, COHEN, *supra* note 2, at 392 (claiming that trust statutes are authorized by the Indian Commerce Clause).

65. United States v. Kagama, 118 U.S. 375, 378 (1886) (stating that it would be a "very strained construction" of the Clause to conclude that it authorized creation of a federal criminal code for Indian country).

legislation regarding Indian tribes."[66] Modern Supreme Court doctrine is that "the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs."[67] This Article will examine whether the Indian Commerce Clause can bear that much weight.

B. The Elusive Basis for Exclusive Authority

During the nineteenth century, judges and advocates began to advance the view that the federal power over foreign, interstate, and Indian commerce is exclusive, implicitly barring *all* state regulation within those spheres.[68] Their twenty-first century descendants make the same sort of claim about the Indian portion of the Commerce Power.[69]

Like the constitutional basis for the doctrine of congressional plenary power, the basis for the Indian version of the exclusivity doctrine is unclear.[70] The most frequently-cited ground[71] for the doctrine is Chief Justice Marshall's opinion in *Worcester v. Georgia*,[72] decided long after the ratification, in which the Court ruled that federal power to deal with the Cherokee tribe was exclusive. However, that case was governed by treaties requiring an exclusive federal-Cherokee relationship.[73]

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66. COHEN, *supra* note 2, at 397; *see also* Fletcher, *Federal Indian Policy*, *supra* note 2, at 137 ("As a matter of federal constitutional law, the Indian Commerce Clause grants Congress the only explicit constitutional authority to deal with Indian tribes.").

67. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989); *see also* United States v. Lara, 541 U.S. 193, 200 (2004); McClanahan v. State Tax Comm'n of Arizona, 411 U.S. 164, 172 n.7 (1973) ("The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making.").

68. *See* STUART STREICHER, JUSTICE CURTIS IN THE CIVIL WAR ERA 66-97 (2005). During the first few decades of operation under the Constitution, the validity of state commercial regulations, if not pre-empted by Congress, was taken for granted. When advocates of exclusive federal power began to raise their arguments during the ante-bellum period, they were forced to accommodate this understanding by classifying state commercial laws as "police power" measures rather than commercial regulations. *Id.* at 70.

69. *Lara*, 541 U.S. at 194; COHEN, *supra* note 2, at 398; DELORIA & LYTLE, *supra* note 2, at 2-3 (claiming that the congressional commerce power is "exclusive"); PRICE & CLINTON, *supra* note 2, at 73 (claiming that the Constitution gave "exclusive control over Indian affairs" to the federal government); Fletcher, *Same-Sex Marriage*, *supra* note 2, at 61 ("[I]t seems clear that the Founders intended to retain exclusive federal authority to deal with the Indian nations," while conceding, "but the Clause does not expressly state this.").

70. For an example of how this issue is fudged, *see, e.g.*, DELORIA & LYTLE, *supra* note 2, at 2-3 (claiming that the congressional commerce power is "exclusive," and *adding* that word to a paraphrase of the Commerce Clause).

71. *E.g.*, Williams v. Lee, 358 U.S. 217, 219-20 (1959) (claiming without examination that *Worcester* established the exclusivity principle for all Indians); Native Am. Church of N. Am. v. Navajo Tribal Council, 272 F.2d 131, 134 (10th Cir. 1959) (relying on *Worcester* for the conclusion that "Indian tribes . . . have a status higher than that of states. They are subordinate and dependent nations possessed of all powers as such only to the extent that they have expressly been required to surrender them by the superior sovereign, the United States").

72. 31 U.S. (6 Pet.) 515 (1832).

73. The problems with relying on *Worcester* as a basis for the exclusivity doctrine are discussed *infra* Part IV.D.3.

On a practical level, the Indian branch of the commercial exclusivity doctrine raises the same sort of difficulties that ultimately led to the substantial rejection of its more expansive forerunner.[74] When coupled with the plenary power doctrine, "exclusivity"—literally construed—would mean that the states could not regulate *any* conduct by Indians,[75] even when state laws do not contradict federal legislation and even though Indians are enfranchised state citizens.[76] Purchases made off the reservation by individual Indians would not be subject to the local version of the Uniform Commercial Code. Indians visiting New York City would not have to obey the Big Apple's traffic laws. In the face of such difficulties, the Supreme Court has acknowledged exclusivity in some cases,[77] but rejected it in others. The border between the two domains has been less a border than a smudge.[78]

As this Article explains, all of this haze is unnecessary. The drafting history of the Constitution,[79] the document's text and structure,[80] and its ratification history[81] all show emphatically that the Indian Commerce Power was *not* intended to be exclusive.

C. The State of the Literature and Role of this Article

Scholarly commentary on the original force of the Indian Commerce Clause is relatively sparse, although some writers have touched on the issue within broader contexts.[82] Most of their commentary is confessedly agenda-driven.[83] Most is also plagued by errors of historical

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74. *See supra* note 69. Aside, of course, from the fairly restricted realm of the Dormant Commerce Clause.

75. Fletcher, *Same-Sex Marriage*, *supra* note 2, at 66 ("States have, as a general matter, no authority over reservation Indians.").

76. U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

77. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 62 (1996) (Rehnquist, J.) ("[T]he States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes.").

78. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980) ("[T]here is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members."); Williams v. Lee, 358 U.S. 217, 219 (1959) ("[T]his Court has modified these [exclusivity] principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized . . . .").

79. *See infra* Part II.B.

80. *See infra* Part II.D.

81. *See infra* Part III.

82. Abel, *supra* note 2, at 467-68; Clinton, *Dormant*, *supra* note 2, at 1058; Clinton, *Supremacy*, *supra* note 2, at 114-16; Prakash, *Fungibility*, *supra* note 2, at 1069-74; Prakash, *Uniformity*, *supra* note 2, at 1149-51; Savage, *supra* note 2, at 59-60; Stern, *supra* note 2, at 1342; *see also* BARSH & HENDERSON, *supra* note 2, at 59 (discussing in passing the original meaning of "Commerce").

83. *See, e.g.*, Clinton, *Supremacy*, *supra* note 2. Professor Clinton characterizes his article in this way:

> [A]n essay intended to translate into American constitutional terms the pride in tribal sovereignty and the deep grief over America's illegitimate colonial expropriation of that au-

method.[84] As a general proposition, the commentary reveals little or no familiarity with such fundamental interpretive tools of originalist analysis as eighteenth-century dictionaries, surveys of period literature, or contemporaneous legal materials.[85] A few authors address the federal convention proceedings, but only one—Professor Robert Clinton—examines the ratification.[86]

This Article represents an effort to ascertain, in a more comprehensive and objective[87] way, the original force of the Indian Commerce Clause. It addresses two principal kinds of questions. The first kind pertains to the *scope* of the Clause: Did it confer a broad police power or something narrower? If the scope was narrower, how can it be defined? The second kind of question pertains to *exclusivity*: Was the power granted to Congress exclusive of concurrent state jurisdiction? If not, what sort of state jurisdiction was to survive?

The standard of interpretation applied here is the same the founding generation would have applied. The standard calls for an inquiry into what eighteenth-century lawyers and judges called the "intent of the makers." The "makers" of the United States Constitution were understood to be the ratifiers. Their "intent" was their subjective understanding where recoverable. If not recoverable, the objective public meaning was sought and presumed to be the makers' intent.[88]

In employing the Founding-Era standard, one can proceed from either of two directions. One may seek the ratifiers' subjective understanding and then fill in any blanks with the original public meaning. Or one may first seek the original public meaning, and then determine if the

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> thority that the author has learned from working with tribal people for over a quarter-century . . . . [T]his paper is intended to provide a legal framework and constitutional roadmap for giving voice, in American constitutional terms, to legitimate tribal claims of federal encroachment on their sovereignty.

Id. at 113; *see also* BARSH & HENDERSON, *supra* note 2, at ix-x ("[W]e hope to transform, rather than negate, the consciousness of non-Indian Americans and preserve the continuity of both tribal and national government."); Abel, *supra* note 2 (dealing with the Indian Commerce Clause as a way to criticize the definition of interstate commerce promoted by advocates of the New Deal); Stern, *supra* note 2 (dealing with the Indian Commerce Clause as a way to defend the definition of interstate commerce promoted by advocates of the New Deal).

84. *See infra* Part IV. (discussing common errors, including errors of historical method).

85. *See, e.g.*, *infra* Part II.A. (showing that eighteenth-century word usages contradict the claim that the phrase "Commerce . . . with the Indian Tribes" had a broader meaning than "trade with the Indian tribes"); *see also infra* Part IV. (discussing instances of historical errors found in legal commentary, including use of anachronistic material and word-meanings).

86. Clinton, *Dormant*, *supra* note 2, at 1058-63. For example, Professor Saikrishna Prakash's otherwise fine study of the Indian Commerce Clause stopped with the proceedings at the federal convention. Prakash, *Fungibility*, *supra* note 2, at 1090. Professor Francis Paul Prucha spent no ink on the ratification process whatsoever, other than quoting in a completely different context one of Madison's numbers in *The Federalist*. PRUCHA, *supra* note 2, at 38.

87. The author is not involved in Indian affairs controversies and has no wider agenda pertaining to them.

88. *See infra* Part III.A.

evidence on the subjective understanding contradicts it. This Article employs the latter approach.

Thus, after this Introduction (Part I), Part II ascertains the original public meaning of the Indian Commerce Clause—that is, the meaning to an objective and reasonably-well-informed observer during the ratification era. Part III then seeks any specific understandings among the ratifiers to the contrary. Part IV examines some significant mistakes made by prior commentators on the Indian Commerce Clause. Part V is a short conclusion.

II. THE ORIGINAL PUBLIC MEANING OF "TO REGULATE 'COMMERCE' . . . WITH THE INDIAN TRIBES"

A. The Meaning of "Commerce" and "Affairs"

When deducing original public meaning, one usually begins with purely textual analysis, and then turns to surrounding materials. The level of misunderstanding in the literature on this subject[89] renders it prudent to reverse the order and review the contemporaneous historical and legal environment before turning to the text.

The misunderstandings in the literature begin with the meaning of the word *commerce.* Some have argued that the Founders intended commerce to encompass not only trade but all gainful economic activity,[90] or even any and all intercourse whatsoever.[91] Although such an expansive meaning seems out-of-place in a listing of enumerated powers—and, indeed, counter-intuitive generally—several recent studies have taken it seriously enough to examine how the word was employed in the lay and legal contexts before and during the Founding Era.[92] Those studies have found that, in the legal and constitutional context, "commerce" meant mercantile trade, and that the phrase "to regulate Commerce" meant to administer the *lex mercatoria* (law merchant) governing purchase and sale of goods, navigation, marine insurance, commercial paper, money, and banking.[93] Thus, "commerce" did not include manufacturing, agriculture, hunting, fishing, other land use, property

89. *See infra* Part IV. (discussing various common errors among commentators on the Indian Commerce Clause).

90. Natelson, *Commerce, supra* note 2, at 791-95 (collecting the sources).

91. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 107-08 (2005) (stating that commerce includes "all forms of intercourse in the affairs of life"). Professor Amar argues that certain provisions of the Indian Intercourse Act of 1790 suggest a broader understanding in the First Congress of the term "commerce." *But see infra* Part IV.B. (pointing out that the Indian Intercourse Act was adopted pursuant to the Treaty Power, not the Commerce Power).

92. *See generally* Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847 (2003); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001); Natelson, *Commerce, supra* note 2.

93. Natelson, *Commerce, supra* note 2, at 845. On the coinage power as part of regulating commerce, *see* Robert G. Natelson, *Paper Money and Original Understanding*, 31 HARV. J.L. & PUB. POL'Y (forthcoming 2008).

ownership, religion, education, or domestic family life. This conclusion can be a surprise to no one who has read the representations of the Constitution's advocates during the ratification debates. They explicitly maintained that all of the latter activities would be outside the sphere of federal control.[94]

The sources further demonstrate that the meaning of commerce was no broader in the Indian context than in the context of foreign and interstate relations.[95] There would be a presumption against this in any event. Contemporaneous legal sources testify to a rule of construction holding that the same word normally had the same meaning when applied to different phrases in an instrument.[96] Varying the meaning of "Commerce" with varying phrases of modification ("with foreign Nations," "among the several States," and "with the Indian Tribes") would have violated that rule.

New technology enables one to examine the use of a given phrase throughout tens of thousands of eighteenth-century documents. Using the Thomson Gale database *Eighteenth Century Collections Online* and the Readex database *Early American Imprints, Series I: Evans, 1639-1800*, I undertook searches of such phrases as "commerce with the Indians" and "commerce with Indian tribes." The results showed those expressions almost invariably meant "trade with the Indians" and nothing more.[97] Other computer searches revealed that "regulation" of Indian

94. *See generally* Natelson, *Enumerated*, *supra* note 2.

95. The question of whether "commerce" means the same thing in Indian commerce as in interstate commerce became a political football during the New Deal era. Commentators who supported the New Deal argued that Indian commerce had a very broad meaning, so interstate commerce must have one also. Stern, *supra* note 2, at 1137, 1342. Commentators who opposed the New Deal, or at least opposed the New Deal version of the Commerce Clause, argued that "commerce" in the interstate context was different than in the Indian context. Abel, *supra* note 2, at 465-68. Both parties' treatments of the issue display the defects of outcome-orientation and insufficient attention to the ratification record.

96. *Flower's Case* (K.B. 1598) 5 Co. Rep. 99a, 77 Eng. Rep. 208 ("[I]n good construction this branch shall have reference to the first, and shall be expounded by it, and so one part of the Act shall (a) expound the other."); *The Case of Chester Mill* (Privy Council 1609) 10 Co. Rep. 137b, 138b, 77 Eng. Rep. 1134, 1135 ("And always such construction ought to be made, that one part of the Act may agree with the other, and all to stand together."); 19 VINER, *supra* note 2, at 526 ("It is the most natural and genuine exposition of a statute to construe *one part* of the Statute *by another part of the same statute*, for that best expresses the meaning of the makers . . . ."); *Id.* at 527 ("*One part* of an act of parliament may *expound another*.").

See generally Clinton, *Supremacy*, *supra* note 2, at 131 (not identifying the contemporaneous rules of construction, but arguing that the same word should be presumed to mean the same thing for all three contexts); Prakash, *Uniformity*, *supra* note 2, at 1150 (making the same point).

97. *See, e.g., Examination of Dr. Benjamin Franklin in the House of Commons* (1766) (on file with the *Denver University Law Review*) ("The *trade with the Indians*, though carried on in America, is not an American interest. The people of America are chiefly farmers and planters; scarce any thing that they raise or produce is an article of *commerce with the Indians*.") (emphasis added); *see also* STATE OF THE BRITISH AND FRENCH COLONIES IN NORTH AMERICA, WITH RESPECT TO NUMBER OF PEOPLE, FORCES, FORTS, INDIANS, TRADE AND OTHER ADVANTAGES 42 (London 1755) ("By means of this post they may be enabled to intercept, or least disturb the trade . . . and could they destroy the commerce of those *Indians* . . . ."); 5 THE WORLD DISPLAYED 65 (London 3d ed. 1769) (discussing commerce with Indians in Canada to mean trade); Letter from Governor Franklin

commerce or of Indian trade was generally understood to refer to legal structures by which lawmakers governed the conduct of the merchants engaged in the Indian trade, the nature of the goods they sold, the prices charged, and similar matters.[98] (Examples appear in the footnote.[99]) This is the same sort of subject-matter one encounters in other kinds of eighteenth-century commercial regulation, adjusted somewhat to address problems specific to the Indian trade.[100] I have been able to find virtually no clear[101] evidence from the Founding Era that users of English varied the meaning of "commerce" among the Indian, interstate, and foreign contexts.

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to Benjamin Franklin (Dec. 17, 1765), *reprinted in* 10 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 681-82 (speaking of "commercial Advantages" of traders having free access to Indian country); 1 EDWARD LONG, THE HISTORY OF JAMAICA 333-34 (London 1774) (discussing various trade advantages of the island of Ruatan [now Roatán], including the benefit to "profitable commerce with the Indian tribes"); A MERCHANT OF LONDON, THE TRUE INTEREST OF GREAT BRITAIN WITH RESPECT TO HER AMERICAN COLONIES STATED AND IMPARTIALLY CONSIDERED 26-27 (London 1766) (using "trade" and "commerce" in the Indian context and generally); 1 MALACHY POSTLETHWAYT, GREAT-BRITAIN'S COMMERCIAL INTEREST 504 (London 2d ed. 1759) (using the phrase "commerce with the Indians" to mean trade with the Indians); 5 T. SMOLLETT, CONTINUATION OF THE COMPLETE HISTORY OF ENGLAND 277 (London 1765) ("Lastly, every Indian trader was to take out a license from the respective governors for carrying on commerce with the Indians."); HENRY TIMBERLAKE, THE MEMOIRS OF LIEUT. HENRY TIMBERLAKE 62-63 (London 1765) (using, with respect to the Indians, "trade" and "commerce" interchangeably; M. DE VATTEL, THE LAW OF NATIONS 226 (Dublin 1787) (using, in an English translation, the phrase "commerce with the Indians" in a general discussion of trade); *see also* GRENVILLE, *supra* note 2, at 20 (discussing how licensing of traders is necessary to regulate "commerce" and the "Indian trade").

98. *See infra* Part II.B.2. (discussing such schemes).

99. *See* Letter from the Earl of Hillsborough to Superintendent Stuart (Jul. 3, 1771), *reprinted in* 14 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 316 (arguing that the colonial assemblies should regulate the "Indian Commerce"); Letter from Governor Franklin to the Earl of Hillsborough (Jan. 14, 1771), *reprinted in* 10 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 691 (using interchangeably the terms "trade" and "commerce" with the Indians in discussing claimed need for regulation); 5 VOTES AND PROCEEDINGS OF THE HOUSE OF REPRESENTATIVES OF THE PROVINCE OF PENNSYLVANIA 221 (Philadelphia 1775) (calling the "*Indian* Commerce of the Province" "a most important Branch of the [total] Trade thereof"); 2 THE POLITICAL AND COMMERCIAL WORKS OF CHARLES D'AVENANT 137 (London Charles Whitworth ed., 1771) ("[T]his [Indian] Trade cannot be preserved by an alliance and treaty of commerce with the Indians"). *Compare* Letter from Superintendent Stuart to the Earl of Hillsborough (Apr. 27, 1771), *reprinted in* 14 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 315-16 (complaining of the "want of Regulation among the Indian Traders" and "merchants engaged in the Indian Trade"), *with* Letter from Earl of Hillsborough to Superintendent Stuart (Jul. 3, 1771), *reprinted in* 14 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 316-17 (acknowledging, apparently in response, "the want of a proper regulation for the Indian Commerce").

100. For example, commercial regulations designed to prevent defrauding the Indians had to deal with the problem of alcohol to a greater extent than did regulations to prevent fraud against foreign nations. Regulation of trade with Europe would have to address the validity of commercial paper, which was not used widely among Indians. And so forth.

101. "Clear" because, as invariably occurs, some passages are ambiguous. For example, one historical work seemed to use "commerce" to mean "communication," although the passage referred also to obtaining plate of precious metal, which gave it an economic flavor. 1 WILLIAM DAMPIER, A NEW VOYAGE ROUND THE WORLD 272 (London 5th ed. 1703) (stating that a sea captain elected to remain in a particular location partly to "get a Commerce with the *Indians* there" so as to make a discovery; but also "by their Assistance to try for some of the Plate of *New Mexico*"). An additional problem with this passage is that it was published too early to be considered within the Founding Era. Still another is that the author writes in a historical rather than a political or official context, where "commerce with the Indians" virtually *always* referred to trade.

Thus, just a few months before the Constitution was drafted, a committee of the Confederation Congress employed the phrase "commerce with the Indians" to mean "trade with the Indians," when it approved instructions to its superintendents of Indian affairs.[102] (Among the members of the committee were James Madison and William Samuel Johnson,[103] both subsequently delegates to the federal convention and leading ratification figures.[104])

When eighteenth-century English speakers wished to describe interaction with the Indians of all kinds, they referred not to Indian commerce but to Indian "affairs." Contemporaneous dictionaries show how different were the meanings of "commerce" and "affairs." The first definition of "commerce" in Francis Allen's 1765 dictionary was "the exchange of commodities." The first definition of "affair" was "[s]omething done or to be done."[105] Samuel Johnson's dictionary defined "commerce" merely as "[e]xchange of one thing for another; trade; traffick."[106] It described "affair" as "[b]usiness; something to be managed or transacted."[107] The 1783 edition of Nathan Bailey's dictionary defined "commerce" as "trade or traffic; also converse, correspondence," but it defined "affair" as "business, concern, matter, thing."[108]

Pre-constitutional congressional documents accordingly treated "affairs" as a much broader category than trade or commerce. A 1786 congressional committee report proposed reorganization of the Department of Indian Affairs. The members of the committee were all leading Founders: Charles Pinckney, James Monroe, and Rufus King.[109] Their report showed the department's responsibilities as including military measures, diplomacy, and other aspects of foreign relations, as well as trade.[110]

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102. *Report of Committee on Indian Affairs*, 32 J. CONT'L CONG. 66, 68 (Feb. 20, 1787) (reciting that "the commerce with the Indians will be an object of importance," then immediately proceeding to discuss policy toward trade and traders). The form for these instructions can be found at WAR-OFFICE OF THE UNITED STATES, INSTRUCTIONS TO SUPERINTENDENT OF INDIAN AFFAIRS FOR THE DEPARTMENT (1787), *available at* Early American Imprints: Series I, 1639-1800 (Readex Sept. 14, 1995); *see* PRUCHA, *supra* note 2, at 46-47 (discussing the congressional ordinance and the instructions).

103. 32 J. CONT'L CONG. 66, 66 (Feb. 20, 1787).

104. *See infra* Part IV.E. (discussing Johnson).

105. ALLEN, DICTIONARY, *supra* note 2 (unpaginated) (defining "affair" as "[s]omething done or to be done. Employment; the concerns and transactions of a nation. Circumstances, or the condition of a person" and "commerce" as "the exchange of commodities, or the buying and selling merchandize both at home and abroad; intercourse of any kind"). The last definition ("intercourse of any kind") was rarely used in the legal context. Natelson, *Commerce*, *supra* note 2, at 806-30.

106. 1 JOHNSON, DICTIONARY, *supra* note 2 (unpaginated) (defining "commerce").

107. *Id.* (defining "affair").

108. BAILEY, DICTIONARY, *supra* note 2 (unpaginated) (defining "commerce" and "affair").

109. 30 J. CONT'L. CONG. 367, 368 (Jun. 28, 1786). King and Pinckney were federal constitutional convention delegates and leading ratification figures in Massachusetts and South Carolina, respectively. James Monroe, the future President, was a moderate Anti-Federalist and floor leader of the Anti-Federalist forces at the Virginia ratifying convention. *See, e.g.*, 3 ELLIOT'S DEBATES, *supra* note 2, at 207-22 (recording one of his speeches).

110. 30 J. CONT'L. CONG. 367, 368-72 (Jun. 28, 1786).

The congressional instructions to Superintendents of Indian Affairs referred to earlier[111] clearly distinguished "commerce with the Indians" from other, sometimes overlapping, responsibilities.[112] Another 1787 congressional committee report listed within the category of Indian affairs: "making war and peace, purchasing certain tracts of their lands, fixing the boundaries between them and our people, and preventing the latter settling on lands left in possession of the former."[113]

B. History Before the Articles of Confederation

1. The Jurisdictional Problem

A recurrent issue in early America was the proper division of power over Indian affairs among different levels of government. The governments involved were both central and local. The central governments were, initially, the British Crown; later the Continental and Confederation Congresses; and finally the federal government. The local governments were at first the colonies and later the states. Two types of issues were involved in allocating authority. The first was the level or levels of government that should control each aspect of Indian affairs. For example, should treaty negotiations be carried on solely by the central government, solely by the colonies/states, or by both? Which level of government should approve Indian land sales to whites? Which level of government should regulate the white traders? And so forth.

The other type of issue was the level or levels of government that should interact with each category of Indians. Indians, like other people, were different from each other. Some, even if members of tribes, were modestly integrated into the life of the colonies or states. Others were governed primarily by their tribes, but lived within colonial or state boundaries. Still others, governed primarily by their tribes, lived outside colonial or state boundaries. It was not always obvious which level of government was best suited to deal with each category.

Herein lay the difficulty: even purely local interactions might have wider consequences—negative externalities. Negative externalities suggested a need for central control. For example, during the British imperial period, the regional effects of colonial failure to properly regulate trade argued for central trade regulation by the British government.[114] On the other hand, the cost of central control sometimes exceeded the

111. *See supra* note 102 and accompanying text.

112. 32 J. CONT'L. CONG. 66, 66-69 (Feb. 20, 1787).

113. 33 J. CONT'L. CONG. 454, 458 (Aug. 3, 1787). The membership of this committee included Melancton Smith, a moderate New York Anti-Federalist and a leading state convention spokesman. *Id.* at 455. As a result of a carefully brokered deal, Smith ultimately voted for ratification. 2 ELLIOT'S DEBATES, *supra* note 2, at 412.

114. PRUCHA, *supra* note 2, at 20-21, 27 (discussing cause and effect of failure adequately to regulate trade).

cost of negative externalities. For example, remote British colonial administration was encumbered by all sorts of practical problems,[115] which argued for regulating trade at the colonial level.[116] Consequently, the most appropriate level of government to handle a particular problem did not always appear obvious.

2. The Regulation of Commerce Before the Articles of Confederation

During the Colonial Era, the lines of jurisdiction between Crown and colonies over Indian affairs sometimes changed and often overlapped. As a general matter, regulation of commerce with the Indians was primarily a matter for the individual colonies,[117] while both Crown and colonies engaged in diplomacy with the tribes. In 1764 the Board of Trade[118] promulgated a plan to centralize in London the regulation of Indian commerce, but this plan lasted only four years.[119] In 1768 the Board of Trade formally divided authority so that London retained control over treaty talks and over issues of land titles outside any colony, while local colonial assemblies handled other governmental functions, including the regulation of commerce with the Indians.[120] Such was the division of authority when the Revolution began.

Before the Revolution, most of the colonies adopted regulations governing the Indian trade.[121] The perceived need for these regulations

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115. *See infra* Part II.B.2., particularly note 117.

116. Natelson, *Commerce*, *supra* note 2, at 841-45 (discussing the Founders' decision to leave to the states alone some powers, even while understanding that the exercise of those powers would have consequences beyond state boundaries).

117. PRUCHA, *supra* note 2, at 21 ("[M]anagement of the trade remained to a great extent in colonial hands.").

118. The Privy Council was the agency ultimately responsible for American affairs. Until 1768, it administered the colonies through the Secretary of State for the Southern Department. Thereafter it operated through a new official, the Secretary of State for American Affairs. The Earl of Hillsborough served as Secretary of State for American Affairs until 1772, when he was succeeded by Lord Dartmouth, who held the office until 1775.

At all times, the relevant secretary of state was advised by the Board of Trade and Plantations, consisting of sixteen members, eight active and eight honorary. At various times in the colonial period, the Board was relatively more or less powerful than other decision makers. Responsibility for colonial decision making was always fractured among these and other agencies, a fact that frequently aggravated British-colonial relations. *See* ESMOND WRIGHT, FABRIC OF FREEDOM 1763-1800, at 27-30 (rev. ed. 1978).

119. PRUCHA, *supra* note 2, at 26 (discussing the content and eventual fate of the Plan of 1764).

120. Letter from Earl of Hillsborough to Governor Tryon (Apr. 15, 1768), *reprinted in* 14 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 265-66 (outlining the division of authority); Letter from Governor Bull to the Earl of Hillsborough (Aug. 16, 1768), *reprinted in* 14 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 268-69 (stating that the issue of Indian trade regulation was postponed until the next session of the colonial legislature); Letter from Superintendent Stuart to Governor Tryon (Sept. 15, 1768), *reprinted in* 14 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 270-71 (explaining further the division of authority); *see also* PRUCHA, *supra* note 2, at 26-27 (discussing the plan's withdrawal).

121. Following are a few examples set forth by jurisdiction. Most states had multiple laws on the subject. Law to Regulate Trade with the Indians, GA. (1735), *reprinted in* 16 EARLY AMERICAN

arose primarily from abuses by merchants ("traders") dealing with the Indians. Abuses included fraud in the sales of goods, exorbitant prices for goods, use of liquor to acquire goods and land at unfairly low prices, extortion, trading in stolen goods, gun-running, and physical invasion of Indian territory.[122] Such conduct by white merchants sometimes provoked Indian retaliation.[123]

The most assiduous regulatory experimentation was conducted by South Carolina, which adopted, amended, and extended its Indian trade statutes many times.[124] By 1751, its code of regulations was the most extensive among North American colonies.[125]

South Carolina governed Indian commerce in several different ways. Some regulations were directed at the identity of those carrying

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INDIAN DOCUMENTS, *supra* note 2, at 363; Law to Regulate Trade With the Eastern Indians, MA. (1753), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 200; Law to Prevent Unlicensed Trade With Indians, N.H. (1713), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 232; Law to Regulate Trade in Liquor with Indians, N.J. (1682), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 666; Law to Regulate the Indian Trade, N.Y. (1742), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 618; Law to Regulate Trade with the Cherokees, N.C. (1778), *reprinted in* 16 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 74; Law to Regulate Trade, N.C. (1757), *reprinted in* 16 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 55 (reproducing a pre-1768 statute); Law to Regulate the Indian Trade, PA. (1758), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 764; Law to Regulate Indian Trade, VA. (1714), *reprinted in* 15 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 133; Law to Regulate Indian Trade, VA. (1765), *reprinted in* 15 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 216; Law to Appoint Commissions for the Indian Trade, VA. (1769) *reprinted in* 15 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 224 (reproducing law passed in response to British decision to devolve trade regulation to the colonies).

122. *See, e.g.*, PRUCHA, *supra* note 2, at 18-20; *see also* Letter from Earl of Hillsborough to Governor Tryon (Apr. 15, 1768), *reprinted in* 14 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 265-66 (complaining of "atrocious Frauds and Abuses" against the Indians); Letter from Cameron to Superintendent Stuart (Oct. 11, 1773), *reprinted in* 14 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 334-36 (complaining of merchants trading rum for stolen horses and stating need to "enforce the Old Regulations"); Letter from Superintendent Stuart to the Earl of Dartmouth (Jan. 3, 1775), *reprinted in* 14 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 359 (complaining of the practice of getting land titles for presents or liquor, and of the weakness of colonial regulation); Letter from William Johnson to Thomas Gage (Nov. 18, 1772), *reprinted in* 10 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 600-02 (complaining of traders' use of liquor).

123. PRUCHA, *supra* note 2, at 20; *see also* GRENVILLE, *supra* note 2, at 19 (referring to the tendency of abuses to raise animosity among the Indians).

124. The numerous South Carolina statutes on the subject are set forth in 16 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 112 (1691 statute); *id.* at 128 (1703 statute); *id.* at 133 (1706 statute); *id.* at 136 (1707 statute—a sweeping measure); *id.* at 153 (a 1711 statute regulating merchants from other colonies); *id.* at 193 (1716 statute); *id.* at 197 (a 1716 statute introducing rules preventing evasion through the use of agents and a seizure remedy); *id.* at 214 (a sweeping 1719 statute); *id.* at 230-33 (a 1721 statute punishing, *inter alia*, extortion of Indians); *id.* at 235 (1722 statute); *id.* at 252 (another 1722 statute); *id.* at 256 (a 1723 statute); *id.* at 263 (a 1731 statute); *id.* at 271 (a 1733 statute); *id.* at 276 (a 1734 statute); *id.* at 279 (a 1736 statute); *id.* at 287 (a 1739 statute); *id.* at 330 (a 1751 ordinance); and *id.* at 342 (a 1762 law regulating trade with the Cherokees); *see* PRUCHA, *supra* note 2, at 19 n.29 (commending and discussing the South Carolina scheme and its relatively effective enforcement).

125. *See* Ordinance to Regulate Indian Affairs, S.C. (1751), *reprinted in* 16 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 330-31.

on that commerce. A trader had to be licensed.[126] He had to be of good moral character and post a bond.[127] A potential applicant's name was posted publicly before applying, so anyone with objections would have an opportunity to raise them.[128] Traders were restricted as to whom they could employ as their agents.[129] The names of potential agents had to be disclosed.[130] Traders who violated these rules by, for instance, trading without a license, were subject to substantial penalties.[131]

In addition, South Carolina law specified where trade could be carried on. A trader's license stated where he was authorized to trade, and he could not work elsewhere.[132] It was illegal to bring natives into white settlements without prior permission.[133] It was illegal for whites to travel into Indian country without prior permission.[134]

South Carolina also laid down rules for the conduct of merchants engaged in Indian commerce. Fraud, duress, and other bad conduct was interdicted and punished.[135] Traders were expected to cooperate in enforcement of the law.[136] They were not to discuss politics with Indians.[137] Traders' goods sometimes were subject to price controls,[138] and usually could not be sold on credit.[139]

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126. Regulations for Indian Affairs, S.C. (1751), *reprinted in* 16 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 331.

127. *Id.* at 332.

128. *Id.*

129. *Id.* at 333-34.

130. *Id.* at 333.

131. *Id.* at 331 (providing for fine of £200), 334 (providing for forfeiture of bond).

132. *Id.* at 333 (limiting traders to locations they are licensed for), 334 (stating that the commissioner is to apportion traders among towns); Ordinance for Regulating the Cherokee Trade, S.C. (1751), *reprinted in* 16 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 335 (limiting traders to locations they are licensed for).

133. Regulations for Indian Affairs, S.C. (1751), *reprinted in* 16 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 334.

134. *See, e.g.*, Law to Preserve Peace and Promote Trade with Indians art. I, S.C. (1739), *reprinted in* 16 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 287 (banning unlicensed persons from Indian country).

135. Ordinance for Regulating the Cherokee Trade, S.C. (1751), *reprinted in* 16 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 335 (requiring traders to "behave justly and honestly toward the Indians" and banning seizure of Indian goods).

136. Regulations for Indian Affairs, S.C. (1751), *reprinted in* 16 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 332. In addition, merchants were required "to keep a Journal of all remarkable Occurrences which they are to deliver to the Commissioner to be laid before the General Assembly," *id.* at 333, and to notify the authorities of "any Matter or Thing in the Indian Country that may affect the Peace and Tranquility of this Government . . . ." *Id.* Merchants who witnessed liquor inventory in the hands of other merchants were expected to seize it. Ordinance for Regulating the Cherokee Trade, S.C. (1751), *reprinted in* 16 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 336.

137. Regulations for Indian Affairs, S.C. (1751), *reprinted in* 16 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 333.

138. *Id.* (stating traders must honor any price-control stipulations in a forthcoming Cherokee treaty).

139. *Id.* at 332. Merchants also were required to disclose to Indians that any debts Indians contracted were unenforceable. *Id.* at 333.

Other regulations focused on the inventory for trade. The items given to and received from the Indians had to be disclosed to the authorities.[140] Traffic in liquor—and sometimes in other goods[141]—was prohibited or strictly limited.[142] Goods had to meet quality standards.[143] Traders had to employ honest weights and measures.[144]

South Carolina law erected an administrative apparatus. Commissioners were appointed and empowered to enforce laws and to judge disputes between traders and between traders and Indians.[145] Commissioners were required to take an oath,[146] to keep adequate records,[147] and to refuse or surrender gifts.[148] The legislature authorized license fees to pay for this system.[149]

Apart from its thoroughness, the South Carolina scheme was not unusual. Most of the provisions listed above appeared in the laws of other jurisdictions.[150] They also appeared in treaties.[151] In other words, this was the sort of scheme the founding generation envisioned when it granted a federal power to "Regulate Commerce . . . with the Indian Tribes."[152]

Experience with commercial regulation at the colonial level (and, later, the state level) was fundamentally unsatisfactory.[153] Most jurisdictions did not have schemes as sweeping as those of South Carolina, and the laws that were enacted were not always enforced efficiently. During

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140. *Id.*

141. *E.g.*, Law to Regulate Trade with Indians, S.C. (1707), *reprinted in* 16 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 137 (barring sale of firearms to enemy Indians); *id.* at 137-38 (barring sale of free Indians as slaves); *see also* PRUCHA, *supra* note 2, at 20 (discussing restrictions on sale of rum).

142. *E.g.*, Ordinance for Regulating the Cherokee Trade, S.C. (1751), *reprinted in* 16 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 336 (authorizing seizure of liquor).

143. *Id.* at 335 (regulating quality of hides).

144. *Id.*

145. Regulations for Indian Affairs, S.C. (1751), *reprinted in* 16 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 332.

146. *Id.* at 331.

147. *Id.* at 331-32.

148. *Id.* at 332.

149. *E.g.*, *id.* (£4 license fee).

150. *See, e.g.*, Law to Regulate the Indian Trade, PA. (1758), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 765-66, 768-69 (appointing commissioners of Indian affairs, empowering them to appoint a place for trade, barring them from trading for their own account, authorizing price controls, barring sale of "spirituous liquors," and providing penalties for breach); *see also* PRUCHA, *supra* note 2, at 19-20 (generalizing about colonial regulatory schemes).

151. *E.g.*, Treaty with the Delawares art. V, Sept. 17, 1778, 7 Stat. 13, *reprinted in* KAPPLER, *supra* note 2, at 4:

> [A]s far as the United States may have it in their power, by a well-regulated trade, under the conduct of an intelligent, candid agent, with an adequate salary one more influenced by the love of his country and a constant attention to the duties of his department by promoting the common interest, than the sinister purposes of converting and binding all the duties of his office to his private emolument.

152. U.S. CONST. art. I, § 8, cl. 3.

153. PRUCHA, *supra* note 2, at 20-21 (discussing failure of colonial regulatory efforts).

the Colonial Era, the British superintendents of Indian affairs complained bitterly about abuses in Indian trade and about what they saw as the unwillingness of colonial officials to correct the problems.[154] Native leaders also frequently complained, urging British officials to further limit trading posts to fixed locations, to tighten trader licensing, and to invalidate land titles received without government authorization.[155]

3. Other Colonial and Early State Governance of Indian Affairs

Throughout the Colonial and Revolutionary period, colonies and states frequently entered into treaties with Indians within their territorial limits.[156] New York even appointed treaty commissioners after the Constitution had been issued and ratified.[157] Less well known[158] is the fact that colonies (and later states) regularly exercised, or attempted to exercise, police power over those Native Americans, tribal and non-tribal, who lived within their borders. This power was in accordance with English case authority, since in 1693, the Court of King's Bench had ruled in *Blankard v. Galdy*[159] that foreign peoples within British domains might initially keep their own laws, but that British law applied once it was "declared so by the conqueror or his successors."[160] During this period,

154. *See, e.g.*, Letter from Superintendent John Stuart to the Earl of Hillsborough (Apr. 27, 1771), *reprinted in* 14 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 315-16 (complaining of "the want of Regulation among the Indian Traders" and "merchants engaged in the Indian Trade"); Royal Instructions to Governor William Campbell of South Carolina (Aug. 5, 1774), *reprinted in* 14 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 345-46 (complaining of abuses and requiring a regulation of the Indian trade); Letter from Superintendent John Stuart to the Earl of Dartmouth (Jan. 3, 1775), *reprinted in* 14 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 359 (complaining of the practice of getting land titles for presents or liquor and of the weakness of colonial regulation); Letter from William Johnson to Thomas Gage (Nov. 18, 1772), *reprinted in* 10 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 600-01 (complaining of abuses and "total want of any regulations").

155. *E.g.*, Proceedings with the Six Nations (1773), *reprinted in* 10 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 605, 607 (recording Indian complaints of a range of abuses and proposals for fixed trading posts and proper regulation); Six Nations Congress (1774), *reprinted in* 10 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 618 (reporting Indian complaints about invasion of hunting grounds by traders and trafficking in liquor).

156. The numerous colonial and state treaties are scattered among the volumes of EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2. *See, e.g.*, Lancaster Treaty, 5 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 51 (reproducing negotiations and 1744 treaty between the colonies of Maryland and Virginia and the Six Nations).

157. *An Act for appointing Commissioners to hold Treaties with the Indians, within this state*, L. N.Y. c. XLVII (Mar. 1, 1788); *An Act to continue and amend an Act, entitled An Act for appointing Commissioners to hold Treaties with the Indians in this State*, L. N.Y. c. XXI (Feb. 12, 1789).

158. Most commentators seem to be unaware of this police power. *See, e.g.*, Savage, *supra* note 2, at 97 (claiming the states had no power over the Indians during the Confederation Era); Fletcher, *Same-Sex Marriage*, *supra* note 2, at 72 ("[T]he Founders wrote that [Indian Commerce] clause with the understanding that Indian tribes would remain outside the borders of the United States, with no serious discussion or expectation that the tribes would survive being surrounded by the states.").

159. (K.B. 1693) 2 Salk. 411, 91 Eng. Rep. 356.

160. *Id.* (*Blankard* arose in Jamaica, said by the court to have been "conquered from the Indians and Spaniards"); *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES *105 ("But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the antient [sic] laws of the country remain, unless such

the colonies and states had "declared so" in numerous statutes. Many of these statutes remained on the books right through the Ratification Era.

The best known of these measures were laws and state constitutional provisions curbing land sales from Indians to whites.[161] These measures were directed mostly at whites, but had obvious effects on Indians as well. For example, such measures could result in the voiding of perfectly reasonable deed transfers by individual Indians or by tribes.[162] In addition, numerous statutes were directed specifically at conduct by Indians. Some were criminal, others civil, governing matters as harmful as theft or as beneficial as conveyancing.[163] Further, colonial govern-

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as are against the law of God, as in the case of an infidel country. Our American plantations are principally of this latter sort."). Calvin's Case (K.B. 1608) 7 Co. Rep. 1a, 77 Eng. Rep. 377, on which Blackstone relied, actually suggested that for non-Christian countries (such as those seized from the Indians), it was not even necessary for the conqueror to declare abrogation of former laws. 7 Co. Rep. at 17b, 77 Eng. Rep. at 398. A case, unreported and not decided by a regular court, is sometimes cited for the contrary position. It is discussed *infra* Part IV.E.

161. *See, e.g.*, An Act Concerning Purchasers of Native Rights to Land, CONN. ACTS AND LAWS (1786) (adopted 1717); An Act for empowering certain Persons to examine the Sales that have been made by the *Moheaunnuk* Tribe of Indians, and for regulating the future Sales and Leases of all lands from the said Tribe of Indians, 1 PERPETUAL LAWS OF MASS. 124 (1784); An Act for regulating the purchasing of land from the Indians, L. N.J. 1 (1703); An Act to punish Infractions of that Article of the Constitution of this State, prohibiting Purchases of Lands from the Indians, without the Authority and Consent of the Legislature; and more effectually to provide against Infractions on the unappropriated Lands of this State, L. N.Y. 366 c. LXXXV (1788); An Act to restrain and prevent the purchasing Lands from Indians, PUB. L. S.C., 160-61 (1790) (adopted 1739); Law to Regulate the Purchases of Indian Lands, VA. (1779), *reprinted in* 15 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 233. *See also* GRENVILLE, *supra* note 2, at 19 (discussing the need for such measures).

162. *See, e.g.*, Law to Regulate the Purchases of Indian Lands, VA. (1779), *reprinted in* 15 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 233 (providing that Indian deeds to certain lands are "utterly void and of no effect").

163. Here are a few additional examples of colony and state police power laws over Indians: An Act for the well-ordering and governing the Indians in this State; and securing their Interest, CONN. ACTS AND LAWS 101-02 (1784) (adopted 1702) (regulating various crimes and land transactions by Indians); A.E. DICK HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 57 (1968) (stating that in Maryland, Nanticoke Indians agreed by treaty in 1687 "that if any Indian commits an offence [sic] against the English he should be tryed [sic] by the English law"); Law to Confine Free Indians to Three Towns, MA. (1681), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 140; An Act for the better regulating of the Indian, Mulatto and Negro Proprietors and Inhabitants of the Plantation called Marshpee, 2 PERPETUAL LAWS OF MASS. 63 (1789) (adopted 1790) (setting up a board of overseers to govern all affairs of the settlement, and establishing various other regulations); Law to Regulate Indian Affairs, N.J. (1757), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 707-09 (regulating contracts by, and debts of, Indians and methods of land conveyancing); Law to Reward the Killing of Wolves and Panthers, N.Y. (1742), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 619 (extending reward system to Indians, free blacks, and slaves); Law to Punish Indians for Drunkenness, PLYMOUTH L. (1662), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 27; Law to Punish Indians for Stealing Hogs, PLYMOUTH L. 218, 218 (1666), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 29; Law to Allow Indians to be Witnesses in Court, PLYMOUTH L. (1674), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 41; Law to Punish Idleness and Stealing by Indians, PLYMOUTH L. (1674), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 41; Laws to Govern Indians, PLYMOUTH L. (1685), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 56-60; An Act to prevent the Stealing and Taking away of Boats and Canoes, PUB. L. S.C., 2 (1790) (adopted 1695) (regulating theft by Indians); *id.* at 166 (specifying how testimony by Indians is to be received), 167 (regulating various thefts or damage by Indians, among others); Law to Punish Slaves and Regulate Free Indians, VA. (1748), *reprinted in* 15 EARLY

ments sometimes imposed fines or tort liability on Native chieftains for injury caused by themselves or by other Indians at their direction.[164] Today, many people might believe that some or most of these assertions of police power were unjust, unenforceable, or both. Perhaps they were. But they demonstrate that the colonies and states did exercise authority over Native Americans within their borders. At least two significant Founders, Thomas Jefferson[165] and William Samuel Johnson,[166] are on record as alluding specifically to this authority.

4. The Drafting of the Articles of Confederation

When Americans began to consider a common government other than the Crown, they had to weigh the same issues of how to divide central and local control over Indian affairs. These were not easy questions. The Indian tribes were (then as now[167]) *sui generis*—neither wholly foreign nor wholly part of the body politic, so foreign and domestic affairs precedents offered no obvious rule for dividing jurisdiction. There certainly was not, as some writers have claimed, any emerging consensus in favor of central over local control.[168]

AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 180 (specifying procedures and punishments in response to a variety of crimes by Indians as well as slaves and mulattos); Law to Allow Nottoways to Lease Their Lands, VA. (1772), *reprinted in* 15 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 226.

164. United Colonies Fine Narragansetts for Abusing Southertown Settlers (1662), *reprinted in* 19 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 374.

165. 6 J. CONT'L CONG. 1077, 1077-78 (July 26, 1776) (referring to the fact that Indians within states were subject to state laws "in some degree").

166. *See infra* Part IV.E. (discussing Johnson). Johnson alluded to colonial laws applying to Indians, "which subject them to Punishment for Immoralities, and crimes, and enact various regulations with respect to them." SMITH, *supra* note 2, at 434 n.109.

167. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980) (discussing the unique nature of Indian tribes).

168. The claim appears in Clinton, *Dormant*, *supra* note 2, at 1082; PRUCHA, *supra* note 2, at 37. However, each of these authors is honest enough to admit the evidence to the contrary, so each has to struggle mightily to preserve the claim of an emerging consensus in favor of central over local control. For example, Professor Clinton reports copious evidence that there was no such consensus. *See, e.g.*, Clinton, *Dormant*, *supra* note 2, at 1082-84, 1086 (describing how colonial governors of Massachusetts, New York, and Pennsylvania resisted efforts at central control); *id.* at 1088-89, 1094-95 (showing how British efforts at centralized control helped bring on the Revolutionary War); *id.* at 1094-95 (admitting that the Board of Trade's plans for more centralized control were abandoned partly because of colonial opposition); *id.* at 1102 (describing how those who favored centralized control through the Articles of Confederation had to compromise by conceding broad authority over Indian affairs to the states); *id.* at 1105 ("During the confederation period, the Continental Congress continually struggled with some of the states over the scope of each government's respective power under the Indian affairs clause of the Articles of Confederation."). For examples of Clinton's struggle to preserve the claim of consensus, *see, e.g.*, *id.* at 1110 (characterizing a defeat for centralizing proposal sponsored in Congress by Rhode Island as "significant support"); *id.* at 1112-13 (characterizing similarly another defeated proposal); *id.* at 1123 (claiming that a compromise requiring the congressional superintendents to "act in conjunction with the Authority" of the states was a victory for centralization).

Professor Prucha similarly reports events that show clearly the absence of a consensus in favor of centralization. *See, e.g.*, PRUCHA, *supra* note 2, at 37-38 (describing the debate over federal versus state control during the drafting of the Articles of Confederation); *id.* at 44-45 (describing New York's challenge to the authority of the Confederation Congress); *id.* at 47 (describing Georgia's

In 1754, Benjamin Franklin drafted a proposed Albany Plan of Union. It was similar to all succeeding proposals for American unity in that it divided responsibility over Indian affairs between central and local authorities, but it reflected Franklin's view that central governance should predominate. The Albany Plan would have granted to the central authority control over those Indian treaties "in which the general interest of the Colonies may be concerned,"[169] leaving, presumably, Indian affairs with only local impact in the hands of individual colonies. The central colonial government also would be empowered to make "peace or declare war with Indian nations,"[170] and to promulgate "such laws as [it] judge[s] necessary for regulating all Indian trade."[171] The central government would have been empowered to acquire Indian lands, but only outside the boundaries of the colonies.[172] Colonial police power apparently would have remained largely intact, but subject to being overridden by central trade regulation.

On July 21, 1775, after the Revolutionary War had begun but before Independence had been declared, Franklin renewed his plea for American unity. That day, he presented to the Continental Congress his own "articles of confederation."[173] This draft also embodied his view that central control over Indian affairs should predominate over local control. It specified that colonies could wage offensive war against the Indians only with the consent of Congress,[174] and would have empowered Congress to appoint commissioners to regulate the Indian trade.[175] It would

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challenge); *id.* at 49 (recording a challenge, apparently successful, by North Carolina)—all of which contradict his generalization. In the teeth of such evidence, though, Professor Prucha inserted generalizations such as, "In the end, the overall necessities of [central Indian control] prevailed," *id.* at 37, and "[t]he centrifugal force of state sovereignty and state pride was never strong enough to destroy the centralization of Indian control," *id.* at 49. He does this even when countervailing material appears in close proximity on his own pages. *See, e.g.*, *id.* at 37-38 (claiming that "the overall necessities of [central Indian control] prevailed," while describing on the very next page the large reservation of control to the states under the Articles of Confederation).

169. ALBANY PLAN OF UNION, art. X (1754).

170. *Id.* at art. XI.

171. *Id.*

172. *Id.* at art. XII.

173. 2 J. CONT'L CONG. 194, 195 (July 21, 1775).

174. *Id.* at 197 (ART. X. "No Colony shall engage in an offensive War with any Nation of Indians without the Consent of the Congress, or great Council above mentioned, who are first to consider the Justice and Necessity of such War.").

175. *Id.* at 198:

> ART. XI. A perpetual Alliance offensive and defensive, is to be enter'd into as soon as may be with the Six Nations; their Limits to be ascertain'd and secur'd to them; their Land not to be encroach'd on, nor any private or Colony Purchases made of them hereafter to be held good; nor any Contract for Lands to be made but between the Great Council of the Indians at Onondaga and the General Congress. The Boundaries and Lands of all the other Indians shall also be ascertain'd and secur'd to them in the same manner; and Persons appointed to reside among them in proper Districts, who shall take care to prevent Injustice in the Trade with them, and be enabled at our general Expence by occasional small Supplies, to relieve their personal Wants and Distresses. And all Purchases from them shall be by the ~~General~~ Congress for the General Advantage and Benefit of the United Colonies.

have made Congress the sole agent for purchase of Indian lands, whether within or outside the boundaries of individual colonies.[176]

Franklin's proposal was not acted on, but the following November Congress did empower a committee to draft regulations for the Indian trade.[177] In June of the succeeding year, when Congress adopted a resolution calling for independence, it also authorized preparation of a plan of "confederation."[178]

The committee that prepared the first official draft of the Articles was chaired by John Dickinson, and the draft is in his handwriting.[179] This draft was reported to Congress on July 12, 1776.[180] Its Indian affairs provisions were in some ways more nationalist[181] than the Franklin draft and in some ways less. As in the Franklin proposal, states were not to wage offensive war against the Indians except with congressional authorization.[182] Dickinson's version granted Congress the exclusive power to acquire land from the Indians, but—unlike Franklin's proposal—only outside state boundaries, once those boundaries had been established.[183] The Dickinson version added a clause empowering Congress to "have the sole and exclusive Right and Power of . . . Regulating the Trade, and managing all Affairs with the Indians."[184] Despite the breadth of this language, Dickinson himself did not think it necessarily

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176. *Id.*

177. 3 J. CONT'L CONG. 364, 366 (Nov. 23, 1775).

178. 5 J. CONT'L CONG. 432, 433 (June 12, 1776).

179. 5 J. CONT'L CONG. 545, 546 n.1 (July 12, 1776).

180. *Id.* at 546.

181. Historians writing of the Founding Era generally adopt the term "nationalist" to refer to ideas and persons favoring a strong central government.

182.

> ART. XIII. No Colony or Colonies shall engage in any War without the previous Consent of the United States assembled, unless such Colony or Colonies be actually invaded by Enemies, or shall have received certain Advice of a Resolution being formed by some Nations of Indians to invade such Colony or Colonies, and the Danger is so imminent, as not to admit of a Delay, till the other Colonies can be consulted.

Id. at 549.

183.

> Art. XIV. A perpetual Alliance, offensive and defensive, is to be entered into by the United States assembled as soon as may be, with the Six Nations, and all other neighbouring Nations of Indians; their Limits to be ascertained, their Lands to be secured to them, and not encroached on; no Purchases of Lands, hereafter to be made of the Indians by Colonies or private Persons before the Limits of the Colonies are ascertained, to be valid: *All Purchases of Lands not included within those Limits, where ascertained, to be made by Contracts between the United States assembled, or by Persons for that Purpose authorized by them,* and the great Councils of the Indians, for the general Benefit of all the United Colonies (emphasis added and footnotes omitted).

Id.

184. *Id.* at 550 ("Art. XVIII. The United States assembled shall have the sole and exclusive Right and Power of . . . Regulating the ~~Indian~~ Trade, and managing all ~~Indian~~ Affairs with the Indians.").

granted Congress truly exclusive power, for he inserted a marginal note querying, "How far a Colony may interfere in Indian Affairs?"[185]

In a committee of the whole, Congress recurrently debated and refined the Articles until November 15, 1777, when Congress finally approved the Articles and sent them to the states for ratification.[186] Unfortunately, most of the congressional debates on the subject during 1776 and 1777 have not been preserved. We do know that jurisdiction over Native affairs remained a controversial point.[187] John Adams' notes tell us that in July 1776 James Wilson of Pennsylvania, among others, argued eloquently for exclusive congressional jurisdiction over all Indian affairs, but that Wilson and his allies lost this point on the floor.[188] Edward Rutledge and Thomas Lynch, Jr., whose state of South Carolina had, as we have seen, made a heavy investment in regulating the Indian trade,[189] "oppose[d] giving the power of regulating the trade and managing all affairs of the Indians to Congress."[190] Thomas Jefferson of Virginia pointed out that Indians who lived within state boundaries already were "subject to [state] laws in some degree."[191] He proposed that Congress control only Indian land sales outside state boundaries.[192] Thus, Congress was wrestling with both kinds of jurisdictional questions:[193] How should the subject matter of Indian affairs be divided between states and Confederation? And, assuming Congress controlled affairs with Indians outside state boundaries, which levels of government should regulate affairs with Indians within state boundaries?

On August 20, 1776, the committee of the whole presented to Congress a revised draft of the Articles. This draft continued the ban on states engaging in offensive war against the Natives[194] and dropped the specific reference to land sales. It provided that Congress would have "the sole and exclusive right and power of . . . regulating the trade, and

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185. *Id.* at 549 n.2.

186. *E.g.*, 5 J. CONT'L CONG. 598, 600, 603-04, 608-09, 612, 615 (July 22-29, 1787) (referring to congressional debate over the Articles of Confederation; there are many other references).

187. PRUCHA, *supra* note 2, at 37 ("Congressional control of Indian affairs, however, was not accepted by all, and the debate on July 26 [1776] indicated a decided divergence of views."); *id.* at 38 (noting of a draft of the Articles limiting congressional control to matters involving "Indians, not members of any of the States" and that "[e]ven this did not satisfy the advocates of state control").

188. 6 J. CONT'L CONG. 1077, 1077-79 (July 26, 1776).

189. *See supra* notes 124-150 and accompanying text. *See also id.* at 1078 (quoting Rutledge and Lynch on South Carolina's investment in Indian affairs).

190. *Id.* at 1077.

191. *Id.* at 1077-78.

192. 6 J. CONT'L CONG. 1076, 1076 (Jul. 25, 1776).

193. *See supra* Part II.B.1.

194. 5 J. CONT'L CONG 672, 679 (Aug. 20, 1776):

> ART. XI. No State shall engage in any war without the consent of the United States in Congress Assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent, as not to admit of a delay, till the other States can be consulted.

managing all affairs with the Indians, not members of any of the States."[195] As contemporaneous dictionaries make clear, the requirement that an Indian be a "member" of a state meant that he had to be integrated into the body-politic as a citizen—or at least a taxpayer—of the state.[196] Congress was to regulate all affairs with Indians outside of state boundaries. It also was to regulate affairs with Indians within state boundaries if they lived subject to their tribes, rather than as taxpayers or citizens. "Indians not paying taxes," whom another part of the Articles excluded for purposes of determining state financial contributions to Congress,[197] were presumed not to be "members" of their states. Member-Indians would remain subject to exclusive state jurisdiction under a clause providing that "[e]ach State reserves to itself the sole and exclusive regulation and government of its internal police, in all matters that shall not interfere with the articles of this Confederation."[198]

The division of power in the draft of August 20, 1776, was unsatisfactory to many because it permitted Congress to interfere with long-established state jurisdiction over affairs with tribal Natives residing within state boundaries. Accordingly, some congressional delegates offered amendments to broaden the Member-Indian exception to the Indian affairs power. One of these amendments, offered on October 27, 1777, would have restricted congressional power to affairs with Indians "not residing within the limits of any of the United States."[199] Relations with all Native Americans within state lines would have been subject to state government only. Another delegate moved that Congress be restricted to "managing all affairs relative to war and peace with all Indians not members of any particular State, and regulating the trade with such nations and tribes as are not resident within such limits wherein a particular State claims, and actually exercises jurisdiction."[200] This would have limited congressional power to diplomacy with tribal Indians (wherever located) and to commerce with Indians in those parts of the West where state land claims had not been renounced.

Neither of these proposals passed, but they showed that some delegates were unhappy with the idea of Congress regulating relations with the Natives within state boundaries. On October 28, the delegates hit upon a formula the majority could agree to. It retained the "Member-Indian" exception to federal jurisdiction, and added another: "provided,

195. *Id.* at 681-82.

196. ALLEN, DICTIONARY, *supra* note 2 (unpaginated) (providing as the second definition of member: "a single person belonging to a society or community"); BAILEY, DICTIONARY, *supra* note 2 (unpaginated) (stating as one definition: "a part of a body-politic, as a Member of Parliament"); JOHNSON, DICTIONARY, *supra* note 2 (unpaginated) (stating as the fourth definition: "one of a community").

197. 5 J. CONT'L CONG. 672, 677-78 (Aug. 20, 1776) (reproducing ART. IX).

198. *Id.* at 675 (reproducing ART. III).

199. 9 J. CONT'L CONG. 841, 844 (Oct. 27, 1777).

200. *Id.*

that the legislative right of any State, within its own limits be not infringed or violated."[201] This was the final change. The result was a clause that included both a sweeping grant of power to Congress—"[t]he United States, in Congress assembled, shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians" [202]—and two sweeping exceptions: "all affairs with the Indians not members of any of the States; provided that the legislative right of any State within its own limits be not infringed or violated."[203]

The exceptions were backed up by a strengthened reservation of state sovereignty in Article II: "Each state retains its sovereignty . . . and every power, jurisdiction, and right which is not by this Confederation expressly delegated to the United States."[204] The result was a clear victory for the advocates of state power. States would retain authority over "Member-Indians"—those who had been completely subject to state laws. States also could continue to exercise authority over tribal Indians within their boundaries, those whom Jefferson had described as "subject to [state] laws in some degree."[205] Congress could negotiate with tribes within state lines but would need to coordinate efforts with state officials or otherwise ensure against infringing on state "legislative right."

This jurisdictional division may be summarized as follows:

* Congress was to enjoy exclusive jurisdiction over all transactions (whether or not commercial)[206] with Indians located outside the organized limits of states—that is, either outside United States boundaries or within federal territories to be formed when states ceded their western land claims to Congress;

* The states were to retain exclusive jurisdiction over relations with Member-Indians (those who paid taxes or were citizens) within their boundaries; and

* Congress and the states were to exercise concurrent jurisdiction over transactions with tribal Indians within state boundaries, but congressional decisions would have to be in compliance with local law.[207]

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201. 9 J. CONT'L CONG. 844, 845 (Oct. 28, 1777).

202. ARTS. OF CONFED. art. IX; *see also* 9 J. CONT'L CONG. 906, 907-25 (Nov. 15, 1777) (setting forth penultimate and final versions of the Articles of Confederation. The Indian affairs language is located at 919).

203. ARTS. OF CONFED. art. IX.

204. *Id.* at art. II.

205. 6 J. CONT'L CONG. 1077, 1077-78 (July 26, 1776).

206. For the contemporaneous definition of "affairs," *see supra* notes 105-110 and accompanying text.

207. Thus, there would be some congressional power within state boundaries. *But see* PRUCHA, *supra* note 2, at 38-39 (averring that congressional laws had effect only outside state boundaries – an uncharacteristic understatement by this author of the scope of central authority).

5. Life Under the Confederation

Congress approved the Articles on November 15, 1777,[208] and the final state ratification came in March 1781.[209] Because of the Articles' odd split of state and congressional authority over Indian affairs, the potential for jurisdictional conflicts always loomed over congressional conduct in that realm. This was particularly true in western territories claimed by states and not yet ceded to the United States. For example, Congress wished to ensure that Indian land conveyances in territories ceded to the United States were valid only if approved by the relevant authority. Congress had to determine whether this meant only state authority or whether congressional ratification would suffice.[210] Eventually, Congress issued a proclamation for territory "without the limits or jurisdiction of any particular State" that barred settlers from lands claimed by the Indians and prohibited Indian land conveyances without congressional permission.[211]

Jurisdiction over the regulation of commerce was a recurrent issue. In 1778, Congress ratified a treaty with the Delawares that required that the tribe "be supplied with such articles from time to time, as far as the United States may have it in their power, by a well-regulated trade."[212] In early 1785, a treaty with the Wyandot and other northern tribes reserved for the United States trading posts and ownership of land surrounding them.[213] Later that year and in early 1786, Congress entered into the three Hopewell[214] treaties with southern tribes—the Cherokee, Choctaw and Chickasaw—and all three provided that Congress would have the sole and exclusive power of regulating trade with the Indians.[215]

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208. 9 J. CONT'L CONG. 906, 907 (Nov. 15, 1777).

209. 19 J. CONT'L CONG. 208, 213-14 (Mar. 1, 1781).

210. 18 J. CONT'L CONG. 914, 915-16 (Oct. 10, 1780) (providing in a committee report, later defeated, that Indian land titles to private parties in areas ceded by states to the general government are not valid unless approved by the state legislature, which provision was altered to "ratified by lawful authority").

211. 25 J. CONT'L CONG. 597, 602 (Sept. 22, 1783).

212. Treaty with the Delawares art. V, Sept. 17, 1778, 7 Stat. 13, *reprinted in* KAPPLER, *supra* note 2, at 4.

213. Treaty with the Wyandot art. IV, Jan. 21, 1785, 7 Stat. 16, *reprinted in* KAPPLER, *supra* note 2, at 7:

> The United States allot all the lands contained within the said lines to the Wyandot and Delaware nations, to live and to hunt on, and to such of the Ottawa nation as now live thereon; saving and reserving for the establishment of trading posts, six miles square [and several other plots] . . . which posts and the lands annexed to them, shall be to the use and under the government of the United States.

214. So called because they were signed at a plantation called Hopewell in South Carolina.

215. Treaty with the Cherokee art. IX, Nov. 28, 1785, 7 Stat. 18, *reprinted in* KAPPLER, *supra* note 2, at 10:

> For the benefit and comfort of the Indians, and for the prevention of injuries or oppressions on the part of the citizens or Indians, the United States in Congress assembled shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as they think proper.

Meanwhile, Congress was moving toward adoption of an ordinance for the regulation of the Indian trade. In 1783, one of its committees suggested that such regulations were necessary,[216] and a second committee was appointed to draft them.[217] It was not until June 1786 that the second committee proposed an ordinance for trade regulation.[218]

By that time most of the state land claims north of the Ohio River had been ceded to Congress, thereby minimizing jurisdictional disputes with states over regulation of trade with the northern tribes. However, the Cherokee, Choctaw, Chickasaw, and Creek tribes lived on land still claimed by Georgia and the Carolinas.[219] During debate on the trade ordinance, William Few of Georgia and Timothy Bloodworth of North Carolina sought to include in the ordinance a provision that it "shall not be construed to operate so as that the legislative right of any state within its own limits be infringed or violated."[220] Charles Pinckney of South Carolina (a state that was about to cede its small and dubious Western claim) and William Grayson of Virginia (which already had ceded most of its claim) managed to secure an amendment to the ordinance's preamble that emphasized congressional power rather than congressional limitations.[221] A few days later—the very date of the third reading—Few, now in team with Edward Carrington of Virginia, proposed the following addition to the measure:

> And be it further Ordained, that in all cases where transactions with any nation or tribe of Indians, shall become necessary to the purposes of this Ordinance, which cannot be done without interfering with the legislative rights of a state, the Superintendant [sic] in whose district

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Treaty with the Choctaw art. VIII, Jan. 3, 1786, 7 Stat. 21, *reprinted in* KAPPLER, *supra* note 2, at 13 (similar provision); Treaty with the Chickasaw art. VIII, Jan. 10, 1786, 7 Stat. 24, *reprinted in* KAPPLER, *supra* note 2, at 15-16 (similar provision).

216. 25 J. CONT'L CONG. 680, 690 (Oct. 15, 1783).

217. *Id.* at 693.

218. 30 J. CONT'L CONG. 367, 368 (June 28, 1786).

219. *See* THOMAS A. BAILEY, THE AMERICAN PAGEANT: A HISTORY OF THE REPUBLIC 138, 284 (5th ed. 1975) (showing the boundaries of land occupied by the Cherokees, Creeks, Chickasaw, Choctaw, and Seminoles, and the western land claims). The fifth edition was the last authored alone by the great Stanford historian. As of 1783, the boundaries of Georgia proper, which were more constricted than they are today, did not include Indian country. However, Georgia's western land claims included territory occupied by the Cherokee, Creek, Chickasaw, and Choctaw. South Carolina claimed some of Cherokee and Chickasaw lands. Within North Carolina proper and partly within North Carolina's western land claim (later Tennessee) lay the remaining Cherokee lands. North Carolina's western land claim also included a sliver of Chickasaw land.

220. 30 J. CONT. CONG. 423, 424 (July 24, 1786).

221. *Id.* at 424-25:

> And whereas the United States in Congress assembled, under the 9th of the Articles of Confederation and perpetual Union, have the sole and exclusive right and power of regulating the trade, and managing all affairs with the Indians not members of any of the States, provided that the legislative right of any State, within its own limits, be not infringed or violated.

> the same shall happen, shall act in conjunction with the Authority of such State.[222]

This amendment passed, nine states to two, and the main motion was carried.[223]

The resulting congressional trade ordinance featured terms typical of previous colonial and state schemes: it authorized appointment of superintendents for the northern and southern districts; it specified that those who wished to reside among or trade with the Indians had to receive a license and post a bond; and it required passports for travel in Indian country.[224] In February 1787, Congress approved detailed instructions for the Superintendents of Indian Affairs, outlining their responsibilities both for Indian commerce and for other matters.[225]

North Carolina officials were unhappy with the congressional treaties with Indian tribes located within its claimed territory. A 1787 set of instructions from that state's house of commons to its congressional delegation complained that the Hopewell treaties had "allotted to the [Cherokees and Chickasaws] certain Lands as their hunting Grounds which are obviously within the Jurisdiction of this State . . . and a great part of which is for a valuable Consideration sold to our Citizens, some of whom are now actually living thereon."[226] The effect was to "suppose a right in the United States to interfere with our Legislative Rights which is inadmissible."[227] An effort by North Carolina delegates John Ash and William Blount to have Congress partially repudiate the Hopewell treaties apparently got nowhere.[228]

Yet the local troubles did not go away. In July 1787—just as the federal convention was holding its closed sessions—Henry Knox, the Secretary of War, issued a thoughtful report to Congress on recurrent Indian conflicts within the Georgia and North Carolina territorial claims.[229] Knox favored congressional intervention to prevent a general war, but acknowledged that the Articles' limited Indian affairs power resulted in Congress being "attended with peculiar embarrassments" (i.e., obstacles).[230] He added, "[t]he Creeks are an independent tribe, and cannot with propriety be said to be members of the State of Georgia, yet the said State exercises legislative jurisdiction over the territory in dispute."[231] He proposed three separate paths by which Congress could

222. 31 J. CONT'L CONG. 488, 488-89 (Aug. 7, 1786).
223. *Id.* at 488-93.
224. *Id.* at 491-92.
225. 32 J. CONT'L CONG. 66, 66-69 (Feb. 20, 1787).
226. 32 J. CONT'L CONG. 237, 237 (Apr. 25, 1787).
227. *Id.*
228. *Id.* at 238.
229. 32 J. CONT'L CONG. 365, 365-66. (July 18, 1787).
230. *Id.* at 366.
231. *Id.*

intervene to resolve the conflict.[232] The first was for Congress to reinterpret the Articles to permit action by the Confederation. The second was for another state to interfere, thereby triggering congressional adjudication power under the Articles. The third was for Georgia and North Carolina to cede the affected territory to the United States, so as to place it under congressional jurisdiction.[233] Of the three, he recommended the last.[234]

Knox's first idea—reinterpreting the Articles—had been tried before. James Madison, an advocate of broad federal authority over Indian relations,[235] thought (as he later said) that the Articles' exceptions to congressional jurisdiction were "obscure and contradictory."[236] In 1784 he had suggested interpreting those exceptions to reserve to the states only the power to make pre-emptive land purchases within state boundaries.[237] Madison's narrow construction was not really tenable, for the exceptions in the final version of the Articles reserved more to the states than would have been reserved by the Franklin and Dickinson drafts.[238] Further, narrow interpretation of state power clashed with the powerful "state sovereignty" rule of Article II.[239]

Few and Blount responded to Knox's report by putting forward their own plan for dealing with unrest in Georgia. This was a proposal for a meeting of Creek and state officials, together with the Confederation Superintendent of Indian Affairs for the Southern Department, to try to resolve the dispute.[240] Nathan Dane of Massachusetts and Richard Henry Lee of Virginia clearly thought this idea inadequate, and moved to postpone the Few-Blount motion in favor of a hearing on a pending committee report that argued, not very convincingly, for a broader rein-

232. *Id.*

233. *Id.*

234. *Id.* at 366-67.

235. Madison apparently favored lodging all power over Indian trade in the central government, and seems even to have claimed at the federal convention that the confederation Congress's jurisdiction over Indian affairs was exclusive. 1 FARRAND, *supra* note 2, at 313, 316 (Madison) (June 19, 1787) ("By the federal articles, transactions with the Indians appertain to Congs. Yet in several instances, the States have entered into treaties & wars with them."); *see also* James Madison, *Vices of the Political System of the United States*, Apr. 1787, *reprinted in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 2, at 167 (listing as "Encroachments by the States on the federal authority," "the wars and treaties of Georgia with the Indians").

236. THE FEDERALIST (No. 42, James Madison), *supra* note 2, at 219.

237. At one point, Madison argued that the state legislative rights protected in the proviso were no more than pre-emptive rights to buy land from the Indians. Letter from James Madison to James Monroe, Nov. 27, 1784, *reprinted in* 2 THE FOUNDERS' CONSTITUTION, *supra* note 2, at 529. Modern writers of the same predisposition have tended to imitate him. *See* 1 PRUCHA, *supra* note 2, at 38, 49 (citing Madison and characterizing the proviso as "cast[ing] a heavy blur over the article" and "hazy"); *see also* Clinton, *Review*, *supra* note 2, at 855 (citing Madison's comment).

238. *See supra* note 203 and accompanying text. Moreover, a proposal from Jefferson to give Congress more specific authority over land purchases apparently had been rejected. 6 J. CONT'L CONG. 1076, 1076-77 (July 25, 1776).

239. ARTS. OF CONFED. art. II ("Each state retains its sovereignty . . . and every power, jurisdiction, and right which is not by this Confederation expressly delegated to the United States.").

240. 33 J. CONT'L CONG. 454, 454 (Aug. 3, 1787).

terpretation of the Articles,[241] and was highly critical of the policies of North Carolina and Georgia.[242] Perhaps recognizing that its interpretive position was weak, the committee had followed Knox's advice and recommended that Georgia and North Carolina cede their western territories to the United States.[243] Congress voted seven states to two for the Dane-Lee motion to postpone the Georgia-North Carolina proposal, but the committee report does not seem to have been taken up.[244]

On October 26, 1787, the Confederation Congress appointed commissioners for signing another treaty with the southern Indians, but it finally surrendered completely on the interpretive question. Its resolution appointed as one of three treaty commissioners the Superintendent of Indian Affairs for the Southern Department, but handed over the other two positions to North Carolina and Georgia authorities.[245] Significantly, the resolution provided that in the Superintendent's absence, the state appointees could conclude the treaty themselves.[246]

I have recited this detailed history to show that the state-congressional jurisdictional conflict during the Confederation period was very much a back-and-forth affair. There was no clear trend in the direction of either local or central control. As far as the delegates to the federal convention were concerned, there was no obvious precedent for them to follow.

C. The Constitutional Convention

The Constitutional Convention convened in May 1787. The delegates, like others before them, would have to grapple with the twin jurisdictional issues of (1) which levels of government regulated which substantive areas and (2) which level of government should treat with which categories of Indians.[247]

During the first two months of the proceedings, however, the convention approved no provision directed specifically toward management of Indian affairs. On July 24, the convention elected a drafting committee—the "Committee of Detail"—laden with legal talent.[248] The chair-

241. *Id.* at 455, 458-59. The committee's argument was obscure, but apparently it was that the state's "legislative right" would not be infringed if Congress treated with Indians within state lines, because *non-Indians* in the region would still be subject to state law.

242. *Id.* at 455-62.

243. *Id.* at 459-60 ("But whatever may be the true construction of the recited clause, the committee are [sic] persuaded that it must be impracticable to manage Affairs with the Indians within the limits of the two States, so long as they adhere to the opinions and measures they seem to have adopted.").

244. *Id.* at 463.

245. 33 J. CONT'L CONG. 707, 708 (Oct. 26, 1787).

246. *Id.*

247. *See supra* Part II.B.1.

248. The members were John Rutledge, Edmund Randolph, Nathaniel Gorham, Oliver Ellsworth, and James Wilson. 2 FARRAND, *supra* note 2, at 106 (Madison) (July 24, 1787). Each of

man was John Rutledge of South Carolina.[249] The convention charged this committee to consider the proceedings already had and "to report a Constitution conformable to the Resolutions passed by the Convention."[250] In addition to its prior resolutions, the convention sent to the Committee of Detail the New Jersey Plan[251] and a proposal prepared by Charles Pinckney.[252] The Committee likely also had access to a plan drafted by John Dickinson.[253]

The New Jersey and Dickinson plans included commerce powers but no specific mention of Indian affairs.[254] The Pinckney Plan would have granted Congress "exclusive Power . . . of regulating the Trade of the several States as well with foreign Nations" and "exclusive Power . . . of regulating Indian Affairs."[255] During committee deliberations, Rutledge suggested incorporating an Indian affairs power.[256]

On August 6, Rutledge announced to the full convention that the Committee of Detail was ready to report its draft constitution.[257] On the subjects of commerce and Indian affairs, the draft followed the New Jersey and Dickinson, rather than the Pinckney, approach. In its list of enumerated federal powers,[258] the document provided authority for the Senate "to make Treaties" and for Congress "[t]o regulate commerce with foreign nations, and among the several States."[259] But there was no specific Indian affairs clause. The panel's failure to include one may have been an oversight, although this seems unlikely because of the Rutledge proposal. Perhaps the committee thought Indian affairs were best handled at the state level unless the federal government saw a need to act through diplomatic channels—i.e., through the treaty power.

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them (other than Gorham, who was a merchant) had good claim to be the leading lawyer in his respective state.

249. Thus, Rutledge made the reports on behalf of the committee. *E.g.*, *id.* at 176 (Journal), 177 (Madison) (Aug. 6, 1787).

250. *Id.* at 106 (Madison) (July 24, 1787).

251. *Id.* at 98 (Journal) (reporting the referral of the Paterson [New Jersey] Plan to the convention).

252. *Id.* at 98 (Journal), 106 (Madison) (reporting the referral of the Pinckney Plan to the committee). Excerpts from the Pinckney Plan are in two locations: *id.* at 134-37, 157-59 (Committee of Detail, III, VII).

253. *See* HUTSON, *supra* note 2, at 84-91 (reproducing two versions of the plan).

254. 1 FARRAND, *supra* note 2, at 242-45 (Madison) (June 15, 1787) (reproducing the New Jersey Plan); HUTSON, *supra* note 2, at 84-91 (reproducing Dickinson's plans).

255. 2 FARRAND, *supra* note 2, at 157 n.15, 158-59 (Committee of Detail, VII) (reproducing an extract in James Wilson's handwriting that was apparently copied from the Pinckney Plan, reading in part, "The Legislature of U.S. shall have the exclusive Power . . . of regulating the Trade of the several States as well with foreign Nations as with each other . . . of regulating Indian Affairs.").

256. *Id.* at 143 (Committee of Detail, IV) (setting forth a marginal note in Rutledge's handwriting to Edmund Randolph's first draft that would have added words "Indian Affairs" to the enumerated power, "[t]o provide tribunals and punishment for mere offences [sic] against the law of nations").

257. *Id.* at 176 (Journal), 177 (Madison) (Aug. 6, 1787).

258. *Id.* at 163-75 (Committee of Detail, IX), 167-69 (enumerating congressional powers).

259. *Id.* at 181, 183 (Madison) (Aug. 6, 1787).

During the weeks after August 6, the full convention intensively discussed and amended the recommendations of the Committee of Detail. Several delegates proposed adding more congressional powers. On August 18, Madison—then firmly of a "nationalist" turn of mind—moved to include nine additional ones.[260] One item was "[t]o regulate affairs with the Indians as well within as without the limits of the U. States."[261] Unlike the next power on his list—granting Congress authority to establish a capital district[262]—Madison did not designate his suggested Indian affairs power as exclusive.[263] This was a notable omission, since he thereby departed from the language both of the Articles of Confederation[264] and of the Pinckney Plan.[265] The convention submitted Madison's suggestions, along with some from other delegates,[266] back to the Committee of Detail.[267]

On August 22, Rutledge announced the Committee of Detail's second report.[268] The panel had rejected some of the suggested powers and accepted others, with or without modification. Madison's Indian affairs clause was among those adopted, but in radically-altered form. The Committee proposed to add to Congress' power "[t]o regulate commerce with foreign nations, and among the several States" the words, "and with Indians, within the Limits of any State, not subject to the laws thereof."[269] As was true of both Madison's proposal and the commerce

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260. *Id.* at 324-25 (Madison) (Aug. 18, 1787):

> To dispose of the unappropriated lands of the U. States
> To institute temporary Governments for New States arising therein
> To regulate affairs with the Indians as well within as without the limits of the U. States
> To exercise exclusively Legislative authority at the seat of the General Government, and over a district around the same not, exceeding ___ square miles; the Consent of the Legislature of the State or States comprising the same, being first obtained
> To grant charters of incorporation in cases where the Public good may require them, and the authority of a single State may be incompetent
> To secure to literary authors their copyrights for a limited time
> To establish an University
> To encourage by premiums & provisions, the advancement of useful knowledge and discoveries
> To authorize the Executive to procure and hold for the use of the U — S. landed property for the erection of Forts, Magazines, and other necessary buildings

(blank space in original).

261. *Id.* at 324.

262. *Id.* at 325 (setting forth a proposed power of exclusive legislative jurisdiction over a capital district).

263. *Id.* at 324 (setting forth Madison's proposed Indian affairs power).

264. *See supra* notes 202-203 and accompanying text.

265. 2 FARRAND, *supra* note 2, at 158-59 (Committee of Detail, VII) (copying from the Pinckney Plan the wording, "[t]he Legislature of the U.S. shall have the exclusive Power . . . of regulating Indian Affairs").

266. *See, e.g., id.* at 325-26 (Madison) (Aug. 18, 1787) (reporting on the referral of additional proposals by Charles Pinckney to the committee); *see also id.* at 326-27 (reporting that a Rutledge proposal to ban diversion of funds appropriated to public creditors was referred to the committee); *id.* at 328 (reporting the referral of other proposals by Rutledge and Elbridge Gerry).

267. *Id.* at 325-28.

268. *Id.* at 366 (Journal) (Aug. 22, 1787).

269. *Id.* at 367.

power in the Committee's original draft, this new version contained no language of exclusivity.

While the language from the Committee of Detail would add somewhat to congressional authority over relationships with the Natives, it was far narrower than Madison's suggestion. The committee version would have limited congressional power to relations only with those Indians *not subject to state laws.*[270] The congressional power would not extend to certain—or perhaps any—Indians living within state boundaries. Furthermore, a congressional power "[t]o regulate commerce" was much narrower than a power "[t]o regulate affairs."[271] As we have seen, the two words carried very different meanings, both in general and specifically in an Indian context.[272] An "affair" could include a commercial transaction, but it also could include a war, a treaty, or a family picnic. Thus, the committee's change would deny Congress competence over diplomacy, boundary adjustment, and other forms of intercourse, all of which would be handled by treaty instead.[273] *A fortiori*, the new language denied Congress any form of police power over the tribes. Instead, Congress would receive only a portion of a single Indian affairs power that, in the days before Independence, the British had set aside for the colonial assemblies.

On August 31, the revised draft was submitted to a Committee of Eleven (one delegate from each of the states then in attendance) for further action.[274] This panel was chaired by Judge David Brearley of New Jersey.[275] It issued its report over several days.[276] The Brearley committee recommended the addition to the Commerce Clause of the phrase, "and with the Indian tribes."[277] This latest version increased federal authority by granting to Congress the ability to regulate commerce with tribes over which states might claim police power jurisdiction.

The convention records show clearly that in the delegates' view the states would enjoy concurrent, although subordinate, jurisdiction with

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270. *Id.*

271. Prakash, *Fungibility*, *supra* note 2, at 1090 ("In other words, though asked to approve broad authority, the Convention chose to grant Congress power only over commerce with Indian tribes"); *accord* Savage, *supra* note 2, at 74 (pointing out that the new provision was limited by the fact that "it extended only to 'commerce,' not to all 'affairs'"). Savage also argues that the net result was a *reduction* of federal power over the Indians from what it had been under the Articles, but by overlooking the significant proviso in favor of the states in the Indian affairs powers of the Articles, he overestimates congressional power under the Articles. *See id.* at 80-81.

272. *See supra* notes 105-110 and accompanying text.

273. *See* Law to Regulate Indian Affairs, N.J. (1757), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 707-09 (including within the heading of "affairs" such items as attachment for debt and methods of land conveyancing).

274. 2 FARRAND, *supra* note 2, at 473 (Journal), 481 (Madison) (Aug. 31, 1787). This was the second "Committee of Eleven" appointed.

275. *Id.* at 483 (Journal) (Sept. 1, 1787) (stating that Brearley gave the committee report).

276. *Id.* at 483-84, 493-96, 505-06 (setting forth reports of September 1st, 4th, and 5th).

277. *Id.* at 493.

Congress over Indian commerce. We have seen that the congressional Indian powers recommended by Madison, by the Committee of Detail, and by the Brearley Committee of Eleven all omitted earlier-suggested language of exclusivity. Indeed, in their discussions of the commerce power in general, delegates repeatedly acknowledged that, subject to some exceptions, states would retain the ability to enact regulatory laws of their own.

To understand this, a good place to begin is with the Committee of Detail's August 6 draft. Article VII, Section 1 of that draft granted the "Legislature of the United States" power to regulate "commerce with foreign nations, and among the several States."[278] Section 4 of the same article prohibited Congress from taxing or interfering with state decisions on one particular branch of foreign commerce, the slave trade.[279] The document also included several absolute and conditional bans on state actions of the sort associated with commercial regulation: Article XII barred states from coining money or entering into treaties,[280] and Article XIII required congressional consent for states to emit bills of credit, adopt certain legal tender laws, tax imports, or enter into compacts with other states or with foreign powers.[281] These exceptions by no means covered the field; on the contrary, they implicitly acknowledged that there were commercial regulations states *could* adopt, even without prior congressional consent.

The concurrent nature of commercial jurisdiction became explicit in the ensuing colloquy. The entire discussion over the extent to which Congress could regulate the slave trade presupposed that, in the absence of constitutionally authorized congressional action to the contrary, the states would continue to have plenary power over that subject.[282] Similarly, on August 21, John Langdon of New Hampshire noted that, while the committee draft banned federal taxation of exports,[283] "the States are left at liberty to tax exports."[284] He objected to this because New Hampshire relied on harbors in other states and therefore "will be subject to be taxed by the States exporting its produce."[285] Oliver Ellsworth of Connecticut, who represented another state that relied mostly on other states' harbors, was more sanguine. He observed that the federal legislature

278. *Id.* at 181 (Madison) (Aug. 6, 1787).
279. *See id.* at 183.
280. *Id.* at 187.
281. *Id.*
282. *See id.* at 370-74. This discussion occurred principally on August 22, and resulted in the Committee of Detail's ban on federal interference being submitted to a Committee of Eleven headed by William Livingston of New Jersey. *Id.* at 374 (Madison), 396 (Journal) (Aug. 24, 1787). The resultant compromise was amended further on the floor. *Id.* at 409 (Journal) (Aug. 25, 1787).
283. *Id.* at 183 (Madison) (Aug. 6, 1787) (reproducing Article VII, Section 4 of the committee draft).
284. *Id.* at 359 (Aug. 21, 1787).
285. *Id.*

could curb any abuses that might arise.[286] Unpersuaded, Langdon proposed a specific ban on "the States from taxing the produce of other States exported from their harbours."[287]

Siding with his Connecticut colleague, Roger Sherman countered that "[t]he States will never give up all power over trade."[288] Ultimately, though, the convention agreed with Langdon, voting a week later to permit the states to tax exports only with prior congressional approval. The convention also specified that any revenue arising from state duties be dedicated to the national treasury.[289]

On August 28—the same day Langdon won his vote—Madison offered two more of his nationalist proposals. One would have prohibited states from using their commercial powers to impose embargoes.[290] Sherman opposed this, arguing that "the States ought to retain this power in order to prevent suffering & injury to their poor."[291] Presumably Sherman wanted state legislatures to be able to proscribe local exports so goods would be sold cheaply at home rather than seeking higher prices abroad. George Mason of Virginia defended state embargoes because a state might need to declare an embargo if hostilities arose suddenly and the national legislature were not in session.[292] Gouverneur Morris, a nationalist normally allied with Madison, argued that Madison's motion was unnecessary, for the overall supervisory power of Congress was sufficient.[293] Madison's motion garnered the votes of only three states,[294] thereby leaving states with the ability to impose embargoes. Madison's other nationalist motion—to strip completely from the states any power to impose *import* duties—also was defeated, seven states to four.[295]

In September, the delegates adopted motions that both increased and decreased state reserved power over commerce. On September 13, George Mason convinced the delegates to ease the conditional ban on state export duties used to finance state inspection laws.[296] Two days later, Gouverneur Morris pointed out that the states remained free to impose tonnage duties for financing harbor improvements,[297] and Madison suggested that this might be inconsistent with the federal commerce power. Sherman responded that because of the supremacy of federal

286. *Id.* at 359-60.
287. *Id.* at 361.
288. *Id.*
289. *Id.* at 437 (Journal) (Aug. 28, 1787); *see also id.* at 442 (Madison).
290. *Id.* at 440 (Madison).
291. *Id.*
292. *Id.* at 441.
293. *Id.*
294. *Id.*
295. *Id.*
296. *Id.* at 607 (Sept. 13, 1787).
297. *Id.* at 625 (Sept. 15, 1787).

laws "there is no danger to be apprehended from a concurrent jurisdiction."[298] Ultimately, Langdon convinced the delegates to insert another specific exclusion from state commercial regulation.[299]

In sum, the convention's deliberations show that states would retain concurrent, although subordinate, authority in the realms of Indian, foreign, and interstate commerce. States could restrict or ban imports and exports over their borders, including but not limited to imports of slaves. They could require inspections of goods in commerce. They could regulate merchants and prices. They could exercise the entire panoply of traditional commercial regulation, subject to some enumerated exceptions and subject to congressional power, to the extent congressional power was constitutionally authorized.

D. The Resulting Constitutional Text

The preceding historical review provides the background for construction of the constitutional text: "The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes."[300] When the contemporaneous meaning of "commerce" is applied to that Clause, it meant that Congress received power to govern in detail the trade carried on between citizens and tribal Natives and those persons involved in that trade. The term "commerce" did not include authority over the tribes' internal affairs.[301]

We have seen that the history of the Clause strongly suggests that this congressional power was not exclusive,[302] and this understanding was represented in the text. Whenever the Constitution granted the federal government exclusive powers, it did so in one of two ways. The first was to employ the word "exclusive," as when the Constitution granted Congress "exclusive Legislation" over the capital district and federal enclaves.[303] Of course, the Commerce Clause did not include the word

298. *Id.*

299. *Id.* at 625-26.

300. U.S. CONST. art. I, § 8, cl. 3.

301. *Id.* at 1084; *see supra* notes 196-211 and accompanying text. *Accord* Clinton, *Review*, *supra* note 2, at 851 (holding that power over "commerce" did not give the federal government jurisdiction over the internal governance of tribes); Savage, *supra* note 2, at 74; Prakash, *Fungibility*, *supra* note 2, at 1081 ("One cannot read the power to regulate commerce with Indian tribes as a power to regulate the Indian tribes themselves.").

302. *See supra* Part II.C.

303. U.S. CONST. art. I, § 8, cl. 17 ("The Congress shall have Power . . . To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . . ."); *cf.* U.S. CONST. art. I, § 8, cl. 8 ("The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the *exclusive* Right to their respective Writings and Discoveries . . . .") (emphasis added).

"exclusive." The other way was to prohibit states from a like exercise. For example, the Constitution bestowed on Congress power to issue letters of marque and reprisal,[304] and forbade the states from doing so.[305] Although the Constitution granted the federal government power to regulate foreign, interstate, and Indian commerce by legislation (the Commerce Clause) and some power to regulate *all* commerce (by treaty),[306] the instrument banned only *some* commercial regulations by states. States could not enter into commercial treaties[307] and they could not coin money[308] or impair "the Obligation of Contracts."[309] But, in absence of congressional or treaty direction to the contrary,[310] states otherwise retained broad authority to regulate foreign, interstate, and Indian commerce.

State concurrent jurisdiction over foreign, interstate, and Indian commerce was not left to mere inference. The text took notice of continuing state jurisdiction over the slave trade.[311] It acknowledged the continuing authority of states to impose tariffs on imports and exports, although it added congressional consent as a precondition.[312] It treated in like manner the pre-existing state power to impose tonnage duties[313] and enter into compacts with other states and with foreign nations.[314] It further acknowledged that states could adopt, even without prior congressional consent, laws governing the inspection of imports and exports, although such laws were subject to congressional revision.[315] The text contained no suggestion that this list of state commercial regulations was complete. We know from the history of the drafting convention that it was not.[316]

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304. *See* U.S. CONST. art. I, § 8, cl. 11 ("The Congress shall have Power . . . To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water . . . .").

305. *See id.* at §10, cl. 1 ("No State shall . . . grant Letters of Marque and Reprisal . . . .").

306. *See id.* at art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . ."); *see also* KAPPLER, *supra* note 2, at 3-18 (setting forth the text of treaties entered into between the United States and various Indian tribes before 1789, almost all of which included terms of commerce).

307. *See* U.S. CONST. art. I, § 10, cl. 1 ("No State shall enter into any Treaty . . . .").

308. *Id.* ("No State shall . . . coin money . . . .").

309. *Id.* ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .").

310. *See id.* at art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

311. *See id.* at art. I, § 9, cl. 1.

312. *Id.* at § 10, cl. 2.

313. *Id.* at cl. 3.

314. *Id.*

315. *Id.* at cl. 2.

316. *See, e.g.*, *supra* notes 290-294 and accompanying text (detailing the convention's decision not to prohibit states from imposing embargoes).

E. Summary: The Original Public Meaning

The "original public meaning" of the Indian Commerce Clause was a power both narrower and broader than that enjoyed by the Confederation Congress. It was narrower in that it did not purport to be exclusive, and it covered only *commercial* transactions with Indian *tribes* rather than all affairs with all Indians. It was broader in that this commercial regulation was not subject to state obstruction, even when it infringed the state's police power over persons within state boundaries. The Tenth Amendment clarified that the states retained whatever was not granted. Among the authority retained was police power over all persons within state boundaries, subject to being overridden by constitutional federal laws and treaties.[317]

If we include the rest of the Constitution in the mix, the original public meaning of the federal government's Indian affairs powers was as follows:

* The government would be able to treat with the Indians through the Commerce Clause, the Treaty Clause, or the Property Clause.

* If Indians were living in a federal territory or on federal land, Congress could govern them through the Property Clause. Federal powers would be very near plenary, especially in the territories.

* If the Indians were located within a state and not on federal land, then federal power depended on whether those Indians were members of tribes. If so, then Congress could regulate trade with them (but only trade) through the Commerce Clause. Or the President and Senate, with approval of the tribe, could authorize broad federal jurisdiction through the Treaty Power. The Treaty Power was broader than the Commerce Clause, but the mechanism for adopting treaties protected states through the requirement that two-thirds of the Senate concur,[318] and it protected the tribes by the requirement that the tribes concur. The states could not interfere with the exercise of any of these powers.

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317. Even during the early days of the republic, the United States made treaties with the Indians that purported to allow the government to manage all their affairs, to the exclusion of other sovereignties. *See, e.g.*, Treaty with the Chickasaws art. VIII, Jan. 10, 1786, 7 Stat. 24, *reprinted in* KAPPLER, *supra* note 2, at 15-16 ("United States in Congress assembled shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as they think proper."); *see also id.* at art. II, at 14 ("Article II. The Commissioners Plenipotentiary of the Chickasaws, do hereby acknowledge the tribes and the towns of the Chickasaw nation, to be under the protection of the United States of America, and of no other sovereign whosoever."); *see also* Treaty with the Shawnee art. II, Jan. 31, 1786, 7 Stat. 26, *reprinted in id.* at 17 ("The Shawanoe nation do acknowledge the United States to be the sole and absolute sovereigns of all the territory ceded to them by a treaty of peace, made between them and the King of Great Britain, the fourteenth day of January, one thousand seven hundred and eighty-four.").

318. *See* Roger Sherman, *A Citizen of New-Haven I*, THE NEW HAVEN GAZETTE, Dec. 4, 1788, *reprinted in* FORD, *supra* note 2, at 233, 235 (averring that the requirement of two-thirds senatorial consent to a treaty protects the rights of states).

* If the Indians were located within a state, on non-federal land, and were not members of tribes, then federal power applied to them in the same way it applied to other persons.

* If the Indians were located within a state—irrespective of whether they were tribal—they were subject to the state police power (if it could be enforced). They were not subject to any federal police power. If the Indians were tribal, federal actions taken within the scope of constitutional authority could limit the exercise of state police power.

III. THE ORIGINAL UNDERSTANDING

A. The Founders' Touchstone for Constitutional Interpretation

When one seeks the original force of a constitutional provision, it makes sense to interpret the document by the same principles the Founders themselves would have applied. The touchstone of documentary interpretation was, as it was called before and during the Founding Era, the "intent of the makers."[319] This principle applied to documents of both private and public law.[320] English courts had refined it over a period of more than two centuries, and American courts and jurists had adopted it.[321]

The principal determinant of the "intent of the makers" was not the intent of the drafters nor even, as some legal writers have claimed, the objective public meaning of the document.[322] It was the subjective understanding of those who had converted the measure into law. This was the legislature in the case of a statute and the ratifiers in the case of a constitution.[323] When (as was very often the case in England), the original subjective intent was not available, the "intent of the makers" had to be deduced from the public meaning of the instrument at the time it became law, based solely on its language and such contemporaneous materials, legal or non-legal, as were available.[324] When the historical record did show a particular subjective understanding, that understanding prevailed.[325] Fortunately, in most instruments the public meaning and the intended meaning are much the same.

Ascertaining, as Part II did, the original public meaning of the Indian Commerce Clause does not therefore end our inquiry. We must now turn to the ratification record to determine if the ratifiers refined or

319. *See generally* Natelson, *Founders*, *supra* note 2 (forthcoming) and sources collected therein.
320. Private law conveyances represented a partial exception to this rule. *See id.*
321. *Id.*
322. *Id.*
323. *Id.*
324. *Id.*
325. *Id.*

contradicted the public meaning of this Clause with a particular understanding, as they did with respect to a few other provisions of the Constitution. [326]

B. The Ratification Process in General[327]

The federal constitutional convention met in Philadelphia from May until September, 1787. Upon adjourning, the convention sent its proposed Constitution to Congress for transmittal to state legislatures and, ultimately, to popularly-elected state ratifying conventions.[328]

In an early propaganda victory, proponents of the Constitution convinced the public to label them "Federalists" and their adversaries "Anti-Federalists."[329] By early January 1788, Federalists had convinced conventions in five states—Delaware, Pennsylvania, New Jersey, Georgia, and Connecticut—to ratify by substantial margins.[330] Thereafter, the opposition stiffened. Anti-Federalists interposed many objections, most derived ultimately from the belief that the Constitution would give far too much power to the central government. Anti-Federalists predicted that the central government would abuse that power and effectively obliterate the states and oppress the people. They argued against approval of the Constitution until a new national convention had met and adopted substantial changes. Federalists recognized that such a course involved great practical difficulties for the Constitution.[331] Faced with the unpleasant alternatives of quick defeat or protracted defeat, they made a pact with political moderates — the fence-straddlers and tepid Anti-Federalists.

Under the terms of this pact, the Federalists made important concessions, and in exchange, the moderates agreed to support the Constitution. These concessions were of three principal kinds. First, the Federalists

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326. *See, e.g.*, Robert G. Natelson, *Statutory Retroactivity: The Founders' View*, 39 IDAHO L. REV. 489, 493–94 (2003) (describing how the ambiguous term *ex post facto* was defined during the ratification to apply only to retroactive criminal, rather than civil, laws).

327. This section is excerpted in large part from Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 WM. & MARY BILL RTS J. 73, 81-83 (2005).

328. *See* 13 DOCUMENTARY HISTORY, *supra* note 2, at xl–xli.

329. Naturally, Anti-Federalists were piqued at this labeling. *See, e.g.*, 1 ANNALS OF CONGRESS 759 (Joseph Gales ed., 1834) (quoting Representative Elbridge Gerry, a former anti-federalist, who complained of this labeling and stated that "[t]heir names then ought not to have been distinguished by federalists and antifederalists, but rats and antirats").

330. *See* 13 DOCUMENTARY HISTORY, *supra* note 2, at xli (providing the chronology and votes).

331. *See, e.g.*, 3 ELLIOT'S DEBATES, *supra* note 2, at 618 (recording the following comments made by Madison at the Virginia ratifying convention: "Suppose eight states only should ratify, and Virginia should propose certain alterations, as the previous condition of her accession. If they [i.e., other states] should be disposed to accede to her proposition, which is the most favorable conclusion, the difficulty attending it will be immense. Every state which has decided it, must take up the subject again. They must not only have the mortification of acknowledging that they had done wrong, but the difficulty of having a reconsideration of it among the people, and appointing new conventions to deliberate upon it.").

offered authoritative and reassuring interpretations of worrisome parts of the document. For example, the Anti-Federalists had been arguing that once the Constitution was in place, the General Welfare Clause[332] might be construed as an independent and indefinite grant of national power. Federalists represented that, on the contrary, the General Welfare Clause was a limitation rather than a grant of power.[333]

Second, the Federalists reassured moderates that the states would retain wide jurisdiction exclusive of the central government. Anti-Federalists had been arguing that the Constitution would sweep all but the most trivial concerns into the national sphere. Federalist speakers and authors, therefore, issued lists enumerating specific functions that would remain the exclusive province of state governments. To the extent we know their identity, these Federalist speakers and authors were leading rather than peripheral figures in the Constitution's cause: James Madison; Alexander Hamilton; James Wilson; Edmund Pendleton, chancellor of Virginia; James Iredell, North Carolina attorney general and judge and later United States Supreme Court Justice; John Marshall; Alexander Contee Hanson, a Congressman from Maryland; Nathaniel Peaslee Sargeant, a Justice (and shortly thereafter, Chief Justice) of the Massachusetts Supreme Judicial Court; Alexander White, a distinguished Virginia lawyer, delegate to his state's ratifying convention, and later a United States Senator; and Tench Coxe, later our first Assistant Secretary of the Treasury.[334]

Third, insofar as the foregoing representations were deemed insufficient, the parties agreed that the Constitution, once ratified, would be amended. At ratifying conventions in Massachusetts, South Carolina, New Hampshire, Virginia, and New York, moderates voted for ratification, and Federalists voted to recommend amendments. After ratification, both sides would work together to secure the needed changes. Two states—North Carolina and Rhode Island—actually postponed ratification until Congress had approved amendments.[335]

Without this political pact, the Constitution probably would not have come into effect.[336] Even with it, the convention majorities for ratification in Massachusetts, Virginia, New Hampshire, and New York

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332. U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . .").

333. *See generally* Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1 (2003).

334. *See* Natelson, *Enumerated*, *supra* note 2, at 479-89 (identifying the contributions of each of these individuals).

335. 13 DOCUMENTARY HISTORY, *supra* note 2, at xlii.

336. *See supra* note 330 and *infra* notes 337-338 and accompanying text.

were quite narrow.[337] North Carolina and Rhode Island did not ratify until the promises in the pact had been honored.[338]

The surviving records of the ratification process and the public bargain that led to ratification are sufficient to enable us to discern, as to many constitutional provisions, the subjective "intent of the makers."

C. The Indian Commerce Clause in the Ratification Process

Commerce with the Indians was a matter of considerable interest during the ratification controversy. Participants in the debates discussed how important it was and how adoption of the Constitution would affect it.[339] Yet there is little, if any, evidence that the ratifiers understood the Indian Commerce Clause differently from the objective public meaning outlined in Part II. On the contrary, surviving records depict ratification figures identifying "Commerce . . . with the Indian tribes" simply with Indian trade and acknowledging that states would retain concurrent, although subordinate, regulation of commerce.

Accordingly, even though James Madison had favored a very broad congressional power over Indian affairs at the federal convention,[340] when arguing for ratification he referred to the new congressional power in a way that equated it to trade regulation only:

> [Under the Constitution] [t]he regulation of *commerce with the Indian tribes* is very properly unfettered from two limitations in the articles of Confederation, which render the provision obscure and contradictory. . . . [H]ow the *trade with Indians*, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible.[341]

Robert Yates, a New York Anti-Federalist who had served as a delegate to the federal convention, argued against ratification. He opposed the Indian Commerce Clause in particular, so if there had been any rea-

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337. The Constitution was approved in Massachusetts by a vote of 187–168, in Virginia by 89–79, in New York by 30–27, and in New Hampshire by 57–47. 13 DOCUMENTARY HISTORY, *supra* note 2, at xli–xlii.

338. *See supra* note 335 and accompanying text.

339. *See, e.g.*, *An American*, PA. GAZETTE, May 28, 1788, *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 2, at 889-90; 3 ELLIOT'S DEBATES, *supra* note 2, at 580 (Adam Stephen, at the Virginia ratifying convention) (reporting that Stephen "then went into a description of the Mississippi and its waters, Cook's River, the Indian tribes residing in that country, and the variety of articles which might be obtained to advantage by trading with these people"); *see, e.g.*, Brutus, *Letter X*, N.Y.J., Jan. 24, 1788, *reprinted in* 25 DOCUMENTARY HISTORY, *supra* note 2, at 462, 465 (admitting, against inclination, that there must be a sufficient standing army for some purposes, including "trade with the Indians"); *see, e.g.*, THE FEDERALIST, *supra* note 2, at 121 (No. 24, Alexander Hamilton) ("[W]e should find it expedient to increase our frontier garrisons . . . . It may be added that some of those posts will be keys to the trade with the Indian nations.").

340. *Supra* notes 260-261 and accompanying text.

341. THE FEDERALIST, *supra* note 2, at 219 (No. 42, James Madison) (emphasis added).

sonable interpretation of that provision that included plenary authority over Indian affairs, he certainly would have pointed it out. Yet he also equated the Indian commerce power to no more than a power over trade. If New York were to ratify the Constitution, Yates wrote that New York would thereby totally surrender into the hands of Congress the management and regulation of the Indian trade to an improper government, and the traders to be fleeced by iniquitous impositions, operating at one and the same time as a monopoly and a poll tax:

> The deputy by the above [Confederation] ordinance, has a right to exact yearly fifty dollars from every trader, which Congress may increase to any amount, and give it all the operation of a monopoly; fifty dollars on a cargo of 10,000 dollars' value will be inconsiderable, on a cargo of 1000 dollars burthensome [*sic*], but on a cargo of 100 dollars will be intolerable, and amount to a total prohibition, as to small adventurers.[342]

Anti-Federalists spent a great deal of time and ink objecting to constitutional provisions, such as the General Welfare and Necessary and Proper Clauses, that they thought would give Congress too much power. Amid all this fervor, Yates was almost the only writer who objected to any part the Commerce Clause[343]—a clear indication that its scope was understood to be fairly narrow. Moreover, the Federalist representations listed above[344] were inconsistent with a broad construction of that Clause. Among the matters they defined as outside the scope of congressional regulation were crimes *malum in se* (except treason, piracy, and counterfeiting), family law, real property titles and conveyances, inheritance, promotion of useful arts in ways other than granting patents and copyrights, control of personal property outside of commerce, torts and

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342. *Address by Sydney*, N.Y.J., Jun. 13-14, 1788, *reprinted in* 6 STORING, *supra* note 2, at 112. *Compare* Federal Farmer, Letters to the Republican, Letter I, Nov. 8, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 2, at 14, 24 (arguing that a central government should have control over "Indian affairs," without necessarily saying the proposed Constitution provided for that); *see also id.*, Letter III, October 10, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 2, at 30, 35 (claiming that among external objects of government under the Constitution would be "Indian affairs," but clearly including the treaty power and other powers, not merely the Commerce Clause).

343. *See, e.g.*, 2 ELLIOT'S DEBATES, *supra* note 2, at 124 (reporting Sam Adams, then an Anti-Federalist, praising the Commerce Clause at the Massachusetts ratifying convention); *see, e.g.*, RICHARD HENRY LEE, LETTERS FROM THE FEDERAL FARMER, *reprinted in* EMPIRE AND NATION 117 (2d ed. 1999) (stating that the commerce power and the power to regulate imposts together would give the union sufficient power); *see, e.g.*, *Albany Anti-Federal Committee Circular*, April 10, 1788, *reprinted in* 21 DOCUMENTARY HISTORY, *supra* note 2, at 1379, 1383 (listing numerous objections to the proposed Constitution, but stating that "[w]ith respect to *the Regulation of Trade*, this may be vested in Congress under the present Confederation") (emphasis in original). *See generally* 21 DOCUMENTARY HISTORY, *supra* note 2 (revealing lack of controversy over the Commerce Clause).

Besides Yates, the only other critic of the Commerce Clause I have found was John Winthrop of Massachusetts, writing as "Agrippa," and his argument was merely that Congress should not have so much power over *commerce*. Letters of Agrippa, *Letter XII*, MASS. GAZETTE, Jan. 14, 1788, *reprinted in* 4 STORING, *supra* note 2, at 97 (objecting to plenary commerce power).

344. *Supra* note 334 and accompanying text.

contracts among citizens of the same state, education, services for the poor and unfortunate, licensing of public houses, roads other than post roads, ferries and bridges, and fisheries, farms, and other business enterprises.[345] The placement of land titles on this list[346] is particularly incompatible with a plenary congressional Indian affairs power. Yet insofar as the record shows, no one suggested that Congress was barred from exercising such powers "except in the case of the Indians." Some did concede that the treaty power might affect land titles, but they affirmed that any treaties would be subject to general limitations of public trust.[347]

The moderates who provided the Constitution's margin of victory in the ratification conventions of several key states were not satisfied solely with Federalist representations of meaning. The moderates also sought, and obtained, a gentlemen's agreement from the Federalists whereby after the Constitution was approved, both sides would work together to obtain a bill of rights. A common proposal for that Bill of Rights was a provision specifying that the states retained any powers not delegated by the Constitution to the central government[348]—the eventual Tenth Amendment.[349] Its purpose was to reassure Anti-Federalists that the new government really would be limited to enumerated powers, without additional authority arising from notions of "sovereignty"[350] or from any other source. By its terms, the Tenth Amendment preserved to the states much of the competence they enjoyed under the Articles of Confederation, including any powers that might have been ceded to Congress under

345. *See* Natelson, *Enumerated, supra* note 2, at 481-88. *See also* Letter from Roger Sherman to Unknown Recipient (Dec. 8, 1787) *reprinted in* HUTSON, *supra* note 2, at 288 (stating that state courts will have exclusive jurisdiction over "all causes between citizens of the same State, except where they claim lands under grants of different states").

346. *See* 2 ELLIOT'S DEBATES, *supra* note 2, at 40 (reporting Edmund Pendleton, a leading federalist spokesman at the Virginia ratifying convention, asking rhetorically: "Can Congress legislate for the state of Virginia? Can they make a law altering the form of transferring property, or the rule of descents, in Virginia?").

347. Natelson, *Public Trust, supra* note 2, at 1151-52.

348. Prototypes for the Tenth Amendment were proposed by the ratifying conventions of seven states: Massachusetts, South Carolina, New Hampshire, Virginia, New York, North Carolina, and Rhode Island. 2 ELLIOT'S DEBATES, *supra* note 2, at 177; *Ratification of the Constitution by the State of South Carolina,* THE AVALON PROJECT AT YALE LAW SCHOOL, http://www.yale.edu/lawweb/avalon/const/ratsc.htm (last visited October 31, 2007); *Ratification of the Constitution by the State of New Hampshire*, THE AVALON PROJECT AT YALE LAW SCHOOL, http://www.yale.edu/lawweb/avalon/const/ratnh.htm (last visited October 31, 2007); *Ratification of the Constitution by the State of Virginia*, THE AVALON PROJECT AT YALE LAW SCHOOL, http://www.yale.edu/lawweb/avalon/const/ratva.htm (last visited October 31, 2007); *Ratification of the Constitution by the State of New York*, THE AVALON PROJECT AT YALE LAW SCHOOL, http://www.yale.edu/lawweb/avalon/const/ratny.htm (last visited October 31, 2007); *Ratification of the Constitution by the State of North Carolina*, THE AVALON PROJECT AT YALE LAW SCHOOL, http://www.yale.edu/lawweb/avalon/const/ratnc.htm (last visited October 31, 2007); *Ratification of the Constitution by the State of Rhode Island,* THE AVALON PROJECT AT YALE LAW SCHOOL, http://www.yale.edu/lawweb/avalon/const/ratri.htm (last visited October 31, 2007).

349. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

350. *See supra* note 36.

the Articles but that, for one reason or another, were not included in the Constitution's enumeration.[351]

Finally, there appears to be no suggestion in the ratification record that anyone thought any part of the Commerce Clause to be exclusive of concurrent state jurisdiction. On the contrary, during his discussion of foreign commerce in *The Federalist*, Madison acknowledged that, in the absence of congressional action after 1808, states could opt either to permit or ban the slave trade.[352] In another paper he asserted that, outside the restraints of Article I, Section 10, the states would enjoy "a reasonable discretion in providing for the conveniency of their imports and exports" while the federal government would hold "a reasonable check against the abuse of this discretion."[353]

IV. DEALING WITH HISTORICAL ERROR

A. Introduction

This Part examines some of the more important historical mistakes and defects in historical method that characterize the legal commentary on the Indian Commerce Clause. This examination has been deferred until now so as to prevent interruptions in the foregoing narrative.

B. The Indian Intercourse Act of 1790

In contending for an expansive view of the commerce power, some have argued that a portion of the Indian Intercourse Act of 1790[354] shows

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351. Savage, *supra* note 2, at 85 (noting that "[t]he [T]enth [A]mendment, of course, does not vest new powers in the states; the reservoir of authority in the states cannot exceed its original bounds"). However, the constitutional text does not suggest, as Mr. Savage did, that the scope of state powers is limited entirely to those retained under the Articles. *See* U.S. CONST. amend. X.

352. THE FEDERALIST, *supra* note 2 (No. 42, James Madison):

> The regulation of foreign commerce, having fallen within several views which have been taken of this subject, has been too fully discussed to need additional proofs here of its being properly submitted to the federal administration.
>
> It were doubtless to be wished, that the power of prohibiting the importation of slaves had not been postponed until the year 1808, or rather that it had been suffered to have immediate operation . . . . [W]ithin that period, it will receive a considerable discouragement from the federal government, and may be totally abolished, by a concurrence of the few states which continue the unnatural traffic, in the prohibitory example which has been given by so great a majority of the union.

Id. at 217.

353. THE FEDERALIST, *supra* note 2, at 233 (No. 44, James Madison). In a comment earlier in *The Federalist*, Madison seems to contradict his later statement by saying that under the Constitution states would not be "at liberty to regulate the trade between state and state." THE FEDERALIST, *supra* note 2, at 218 (No. 42, James Madison). However, it is clear from the context that in No. 42 he was speaking only of state imposition of import and export duties, forbidden without congressional consent by U.S. CONST. art. I, § 10, cl. 2. THE FEDERALIST, *supra* note 2, at 218-19 (No. 42, James Madison).

354. 1 Stat. 137-38 (1790).

an intended meaning for Indian "commerce" that goes beyond mere trade.[355]

As an initial matter, however, the date of the law gives pause. The best evidence of the content of the ratification bargain is matter arising previous to or contemporaneously with that bargain. Later material—if probative at all—is subject to a discount. When the Indian Intercourse Act became law in mid-1790, the Constitution already had been approved by all thirteen states, and the Bill of Rights ratified by nine of the necessary ten.[356] In fact, the Constitution had been approved by the necessary nine states for over two years and the government had been in operation for over a year. More than a year had elapsed since New York and Virginia formally applied for a new federal convention, and no other state had followed suit.[357] By this time, constitutional interpretation had become vulnerable to political "spin" without regard to whether that "spin" actually reflected the ratifiers' understanding, because it was unlikely the Constitution was going to be repealed or massively overhauled. By this time also, the political alignment that had characterized the Ratification Era and the first session of the First Congress had shifted markedly.[358] Adding to those considerations is the obvious fact that "legislators [here, Congress] have very different incentives and operate under

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355. *See, e.g.*, Akhil Reed Amar, *America's Constitution and the Yale School of Constitutional Interpretation*, 115 YALE L.J. 1997, 2004 n.25 (2006):

> It also bears note that none of the leading clausebound advocates of a narrow economic reading of 'commerce' has come to grips with the basic inadequacy of their reading as applied to Indian tribes, or has squarely confronted the originalist implications of the Indian Intercourse Act of 1790, in which the First Congress plainly regulated noneconomic intercourse with Indian tribes.

Id.

See also Fletcher, *Federal Indian Policy*, *supra* note 2, at 137 (implying that early Trade and Intercourse Acts were enacted pursuant to the Indian Commerce Clause). *Cf.* AMERICAN INDIAN LAW DESKBOOK 13, 15 (Julie Wrend & Clay Smith eds., 2d ed. 1998) (claiming that the Act reflected congressional "intent, which has never changed, to occupy the area of Indian affairs with federal law" as seen by the early "Trade and Intercourse Acts" which revealed "Congress's unmistakable objective of exercising plenary control over Indian affairs").

To be sure, congressional intent, even the intent of the First Congress, should not be confused with ratifier understanding.

356. 13 DOCUMENTARY HISTORY, *supra* note 2, at xl-xlii (outlining chronology for adoption of Constitution); 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1193-1201 (1971) (showing ratification of the Bill of Rights by nine states before adoption of the Indian Intercourse Act on July 22, 1790). In theory, the Indian Intercourse Act could be used as evidence of how the Virginia or Vermont legislature interpreted the Bill of Rights, since neither state ratified until late 1791.

357. For the Virginia and New York applications, *see* 1 HOUSE J. 28-30 (May 5-6, 1789); *see also* Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 YALE L.J. 677, 764-89 (1993) (listing all convention calls from the Founding until 1993).

358. CHARLES C. THATCH, JR., THE CREATION OF THE PRESIDENCY, 1775-1789: A STUDY IN CONSTITUTIONAL HISTORY 125-26, 150 (2007 reprint) (1923) (discussing why the First congressional session only should be considered part of the constitution-making process).

very different institutional restraints than do constitutional drafters or ratifiers."[359]

Thus, uncorroborated inferences deduced from the Indian Intercourse Act about what the ratifiers understood two or three years earlier would be uncertain evidence as to the meaning of the Commerce Clause even if Congress had adopted the measure pursuant to that Clause. As explained below, however, Congress actually adopted the Indian Intercourse Act pursuant to the Treaty Power.

The full title of the law in question was an "Act to Regulate Trade and Intercourse With the Indian Tribes." The first three sections provided for federal licenses for trading among Native Americans, for recall of licenses for violation of federal trade restrictions, and for prohibition of trading without a license[360]—all standard regulations of commerce with the Indians.[361] Section 4 banned Native land conveyances, unless "made and duly executed at some public treaty."[362] Section 5 provided that if a citizen or inhabitant of the United States committed a crime in Indian country, that citizen would be tried and punished according to the law of his home state or territory in the same manner as if he had committed the crime against a non-Indian.[363] On its face, therefore, Section 5 was a criminal rather than a commercial regulation, and it is this feature

359. Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the* Hamdan *Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1045 (2007).

For an example of how constitutional interpretations before and after ratification can change, *see, e.g.*, Alexander Hamilton, *Report on Manufactures* (Dec. 5, 1791), *reprinted in* 1 AMERICAN STATE PAPERS 123, 136 (interpreting the Constitution to justify federal interference in manufacturing). *But see* THE FEDERALIST, *supra* note 2, at 165 (No. 34, Alexander Hamilton) (claiming the federal government would have no role in manufacturing and agriculture); *see also* THE FEDERALIST, *supra* note 2, at 81 (No. 17, Alexander Hamilton) (arguing that "the supervision of agriculture, and of other concerns of a similar nature . . . can never be desirable cares of a general jurisdiction").

360. 1 Stat. 137-38, §§ 1-3 (1790).

361. *Supra* notes 126-150 and accompanying text (detailing typical Indian trade regulations of the time).

362. 1 Stat. 138, § 4 (1790) ("[N]o sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.").

363.

> [I]f any citizen or inhabitant of the United States or of either of the territorial districts of the United States, shall go into any town, settlement or territory belonging to any nation or tribe of Indians, and shall there commit any crime upon, or trespass against, the person or property of any peaceable and friendly Indian or Indians, which, if committed within the jurisdiction of any state, or within the jurisdiction of either of the said districts, against a citizen or white inhabitant thereof, would be punishable by the laws of such state or district, such offender or offenders shall be subject to the same punishment, and shall be proceeded against in the same manner as if the offence [sic] had been committed within the jurisdiction of the state or district to which he or they may belong, against a citizen or white inhabitant thereof.

Id. at § 5.

that is cited as evidence that the Founders intended the Commerce Clause to encompass more than mere trade.[364]

As least one Supreme Court Justice has addressed the question of whether this sort of regulation can be characterized as a regulation of commerce. In his concurring opinion in *Worcester v. Georgia*,[365] Justice McLean contended that this section's successor[366] was, despite its criminal content, a merely routine trade regulation.[367] He emphasized that the law regulated the conduct of *United States citizens and residents only*. It did not regulate the conduct of Indians and certainly was not an assertion of "political jurisdiction" over Indian country.[368] Measures such as these, he said, were typical of those requiring a nation's own citizens to honor the terms of embargos and other trade restrictions.[369]

To be sure, McLean's unsupported statement is not really probative of original understanding, for he was writing long after the Founding Era and did not cite sources from that time. Wyndham Beaves' leading 1771

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364. *Supra* notes 91, 355 and accompanying text.

365. 31 U.S. (6 Pet.) 515 (1832).

366. An Act to Regulate Trade and Intercourse with the Indian Tribes, and to Preserve Peace on the Frontiers § 6, 2 Stat. 142 (1802) (providing for the death penalty for citizens and residents who commit murder in Indian country).

367. Justice McLean noted:

> Under this clause of the constitution [the Indian Commerce Clause], no political jurisdiction over the Indians, has been claimed or exercised. The restrictions imposed by the law of 1802, come strictly within the power to regulate trade; not as an incident, but as a part of the principal power. It is the same power, and is conferred in the same words, that has often been exercised in regulating trade with foreign countries. Embargoes have been imposed, laws of non-intercourse have been passed, and numerous acts, restrictive of trade, under the power to regulate commerce with foreign nations.
>
> In the regulation of commerce with the Indians, congress have [sic] exercised a more limited power than has been exercised in reference to foreign countries. The law acts upon our own citizens, and not upon the Indians, the same as the laws referred to act upon our own citizens in their foreign commercial intercourse.

Worcester, 31 U.S. (6 Pet.) at 592 (McLean, J., concurring).

368. McLean also observed: "[N]o political jurisdiction over the Indians, has been claimed or exercised . . . . The law acts upon our own citizens, and not upon the Indians, the same as the laws referred to act upon our own citizens in their foreign commercial intercourse." *Id.* *See also* Clinton, *Supremacy*, *supra* note 2, at 134 (pointing out that restrictions on persons in early treatises generally were "aimed at non-Indians who dealt with Indians").

McLean added that such laws were "not as an incident [to the commerce power], but as a part of the principal power." *Worcester*, 31 U.S. (6 Pet.) at 592 (McLean, J., concurring). This is certainly an overstatement, since a law creating non-commercial crimes is not a law regulating "commerce." But it certainly could have served as a law incidental to the regulation of commerce – that is, a law authorized by the Necessary and Proper Clause, pursuant to the Founding Era incidental powers doctrine. *See* Natelson, *Tempering*, *supra* note 2, at 102-13 (outlining that doctrine). Under the incidental powers doctrine, a power was incidental to a principal power if it was less "worthy" than the principal power and either (1) a customary means of exercising it (as McLean indicated this was) or (2) reasonably necessary for exercising it. *Id.* at 110. Here, it could be argued that crimes committed by whites in Indian country raised resentments that rendered federal-tribal commercial relationships difficult and that the provision's limited scope rendered it less "worthy" than the principal power. Nonetheless, a general federal control over crimes in Indian country would be disqualified as an incident because it is a distinct subject matter and rivals the purported principal in importance. *Id.* at 106.

369. *See supra* note 367.

navigation law treatise does confirm, though, that during the Founding Era governments commonly exerted extra-territorial jurisdiction to enforce trade embargos.[370]

Whatever the merits of Justice McLean's conclusion, the fundamental problem with arguing that the Indian Intercourse Act sheds light on the Commerce Clause is this: the Indian Intercourse Act was not adopted pursuant to the Commerce Clause. It was adopted pursuant to the Treaty Power.[371]

In 1785 and 1786 Congress entered into the three "Hopewell" treaties with the Cherokees, Chickasaws, and Choctaws.[372] By the terms of all these treaties, the United States had promised to regulate trade between the United States and the Natives "[f]or the benefit and comfort of the Indians, and for the prevention of injuries or oppressions on the part of the citizens or Indians."[373] The tribes, President Washington, and Secretary of War Henry Knox all were unhappy over white abuses that continued in defiance of the treaties, and became convinced that enforcement legislation was needed.[374]

On August 22, 1789, the President entered the chamber of the Senate and consulted its members on Indian affairs.[375] After reciting the tribes' dissatisfaction, he noted that the Cherokees lived primarily in North Carolina, which had not yet joined the union, and added:

> The commissioners for negotiating with the Southern Indians may be instructed to transmit a message to the Cherokees, stating to them, as far as may be proper, the difficulties arising from the local claims of North Carolina, and to assure them that the United States are not unmindful of the treaty at Hopewell . . . .
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> . . . .
>
> The Commissioners may be instructed to transmit messages to the said tribes, containing our assurances of the continuance of the friendship of the United States, and that *measures will soon by taken*

370. WYNDHAM BEAWES, LEX MERCATORIA REDIVIVA OR, THE MERCHANT'S DIRECTORY 242 (London 3d ed. 1771) (describing the actions that governments could take during embargoes).

371. PRUCHA, *supra* note 2, at 89-90 (stating that the various Indian intercourse laws were "originally designed to implement the treaties and enforce them against obstreperous whites").

372. Treaty With the Cherokee, Nov. 28, 1785, 7 Stat. 18, *reprinted in* 2 KAPPLER, *supra* note 2, at 8; Treaty With the Choctaw, Jan. 3, 1786, 7 Stat. 21, *reprinted in* 2 KAPPLER, *supra* note 2, at 11; Treaty With the Chickasaw, Jan. 10, 1786, 7 Stat. 24, *reprinted in* KAPPLER, *supra* note 2, at 14.

373. *See, e.g.*, Treaty with the Chickasaw art. VIII, Jan. 10, 1786, 7 Stat. 24, *reprinted in* 2 KAPPLER, *supra* note 2, at 15-16 ("ARTICLE 8. For the benefit and comfort of the Indians, and for the prevention of injuries or oppressions on the part of the citizens or Indians, the United States in Congress assembled shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as they think proper.").

374. PRUCHA, *supra* note 2, at 89.

375. 1 ANNALS OF CONG. 66 (Joseph Gales ed., 1789).

for extending a trade to them agreeably to the treaties of Hopewell.[376]

The President then proceeded to impress upon his listeners the importance of an early agreement with the Creeks.[377] He returned two days later for further consultation.[378] Congress responded the following summer by enacting the Indian Intercourse Act.

Hence, the first three sections of the Act were designed to fulfill the promise of the United States to regulate trade for the benefit of the Indians. Section 4 was, by its terms, designed to effectuate Indian treaties.[379] Section 5—the substantive criminal provision—loosely tracked the language in another provision of the Hopewell pacts, which required that United States citizens who committed crimes in Indian country be tried and punished as if they had committed those crimes against fellow citizens.[380] Provisions in treaties that defined and provided for punishment of crimes were well precedented.[381]

The trade and criminal portions of the Indian Intercourse Act applied to all Native Americans, not merely the Hopewell tribes. But that was because none of the treaties limited their primary benefits to members of the signatory tribes. The trade provisions in the treaties referred generally to "the Indians,"[382] and the criminal sections referred to "any Indian."[383] Further, the broad statutory language was appropriate be-

376. *Id.* at 67 (emphasis added).

377. *Id.*

378. *Id.* at 69-70.

379. *See supra* note 362 and accompanying text.

380. For example, the 1786 Treaty With the Choctaw provided:

> If any citizen of the United States of America, or person under their protection, shall commit a robbery or murder, or other capital crime, on any Indian, such offender or offenders shall be punished in the same manner as if the robbery or murder, or other capital crime, had been committed on a citizen of the United States of America; and the punishment shall be in presence of some of the Choctaws, if any will attend at the time and place; and that they may have an opportunity so to do, due notice, if practicable, of the time of such intended punishment, shall be sent to some one of the tribes.

Treaty with the Choctaw art. VI, Jan. 3, 1786, 7 Stat. 21, *reprinted in* 2 KAPPLER, *supra* note 2, at 13. It is likely that the substantive criminal provision of the treaties, and therefore the analogous provision in the Indian Intercourse Act, were suggested by existing statutes in Virginia and South Carolina. The Virginia enactment was not a trade measure at all. Law to Punish Crimes Committed in Indian Territory, VA. (1784), *reprinted in* 15 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 241-42 (reproducing a criminal and extradition statute). The South Carolina law was a mixed statute, containing both trade and non-trade features. Law to Preserve Peace and Promote Trade with Indians arts. I, IX, S.C. (1739), *reprinted in* 16 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 287, 290.

381. *E.g.*, A Treaty Marine, Neth.-U.K., Dec. 1, 1674, *reprinted in* GILES JACOB, LEX MERCATORIA OR, THE MERCHANT'S COMPANION 203, 212 (London 2d ed. 1729) (providing for punishment for torture).

382. *See, e.g.*, *supra* note 373 (reproducing Article VIII of the Chickasaw treaty).

383. *E.g.*, Treaty with the Choctaw arts. V-VI, Jan. 3, 1786, 7 Stat. 21, *reprinted in* 2 KAPPLER, *supra* note 2, at 12-13 ("If *any Indian or Indians*, or persons, residing among them, or who shall take refuge in their nation, shall commit a robbery or murder or other capital crime on any citizen of the United States of America, or person under their protection, the tribe to which such offender may belong, or the nation, shall be bound to deliver him or them up to be punished according to the

cause the government apparently planned to apply the Hopewell language as a template for future agreements: very similar terms were contained in a fourth treaty, signed only a few days later with the Creeks,[384] and in a fifth, concluded the following year with the Cherokees.[385]

A law enacted to execute the Treaty Power cannot be said to represent an interpretation of the Commerce Clause.

C. Unfamiliarity With the Record of the Federal Convention

Another sort of mistake in the commentary arises from insufficient knowledge of proceedings at the federal constitutional convention. Justice Johnson's famous concurring opinion in *Gibbons v. Ogden*,[386] in which he argued that the Commerce Clause was inherently exclusive of state jurisdiction, was an error of this kind.[387] We have seen that most of the convention delegates would have disagreed with Justice Johnson, for they voted specifically to leave substantial commercial powers, including the power to impose trade embargoes, with the states.[388] Although the structure of the constitutional text leaves little excuse for Johnson's error,[389] he can be forgiven his ignorance of the convention proceedings. He wrote sixteen years before publication of Madison's notes;[390] and while there are alternative sources of information for much of the convention, Madison's record is virtually the only detailed exposition for the time during which the convention discussed state commerce powers.

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ordinances of the United States in Congress assembled . . . . If any citizen of the United States of America, or person under their protection, shall commit a robbery or murder, or other capital crime, on *any Indian*, such offender or offenders shall be punished in the same manner as if the robbery or murder, or other capital crime, had been committed on a citizen of the United States of America . . . .") (emphasis added).

384. Treaty With the Creeks art. IX, Aug. 7, 1790, 7 Stat. 35, *reprinted in* 2 KAPPLER, *supra* note 2, at 27.

385. Treaty With the Cherokee art. XI, July 2, 1791, 7 Stat. 39, *reprinted in* 2 KAPPLER, *supra* note 2, at 31.

386. 22 U.S. (Wheat.) 1 (1824).

387. *Id.* at 89-90 (Johnson, J., concurring).

388. *Supra* note 294 and accompanying text.

389. *See supra* Part II.D.

390. The notes were first published in 1840. 1 FARRAND, *supra* note 2, at xv (editor's note).

This lack of availability may also explain the dicta in the same case by Chief Justice Marshall suggesting that congressional power over commerce might be exclusive of the states. Marshall contended that the powers excepted from state jurisdiction in U.S. CONST. art. I, § 10 did not demonstrate that states had concurrent jurisdiction outside the exceptions because the activities denominated in the exceptions were not really commerce. *Gibbons*, 22 U.S. (Wheat.) at 200-03.

Even without the notes, Marshall's error is surprising. The question of when duties are regulations of commerce and when they were primarily taxes was a major point of contention during the pre-Revolutionary era – most eloquently argued by John Dickinson in his *Farmer Letters* of 1767-1768. *See, e.g.*, Robert G. Natelson, *The Constitutional Contributions of John Dickinson*, 108 PENN ST. L. REV. 415, 436-38 (2003). Had Marshall forgotten in the intervening decades? Perhaps he remembered at some point, because later in his opinion he conceded that "duties may often be, and in fact often are, imposed on tonnage, with a view to the regulation of commerce . . . ." *Gibbons*, 22 U.S. (Wheat.) at 202.

The episode illustrates for judges the perils of random dicta and for all lawyers and historians the risks of relying on nineteenth century material as evidence of original understanding.

More recently, it has been asserted that the "spirit of the [convention] proceedings"[391] showed that the finished Indian Commerce Clause was to be a very broad federal power.[392] In fact, the "spirit" of the convention in August 1787—when the Clause was proposed, mooted, amended, and inserted—was very different from the mood of nationalism that had reigned there during the convention's initial period. Earlier, the delegates seemed ready to propose a government in which the states would survive only as subordinate entities. After July 17, the "spirit of the proceedings" shifted markedly in the direction of decentralization.[393] A majority of the delegates—and in particular the Committee of Detail—began reining in nationalist aspirations.[394] Previously-adopted resolutions authorizing broad and indefinite federal powers were jettisoned in favor of relatively precise enumeration.[395] The changes in Madison's Indian affairs proposal are indicative of what happened to many nationalist amendments introduced during the last two months.[396] So also is the defeat of his motions to circumscribe state commercial powers.[397] We do not know the reason for the convention's change in attitude. It may have been the realization that a strongly nationalist plan would never win public approval.

A related mistake has been to identify James Madison's preferred constitutional arrangement with what the convention actually produced.[398] This is an error because, as we have seen, Madison was somewhat more nationalist than most of the other delegates, especially during the convention's final two months;[399] and he was *far* more nationalist

391. Stern, *supra* note 2, at 1342.

392. *E.g.*, *id.* (claiming that the "whole spirit of the proceedings" supports a very broad power).

393. Natelson, *Enumerated*, *supra* note 2, at 472-73.

394. John C. Hueston, *Altering the Course of the Constitutional Convention: The Role of the Committee of Detail in Establishing the Balance of State and Federal Powers*, 100 YALE L.J. 765, 766 (1990) (focusing on, and arguably over-emphasizing, the committee's role in altering the convention's nationalist course).

395. Natelson, *Enumerated*, *supra* note 2, at 472-73.

396. For example, several of Madison's other enumerations had even less success than his Indian affairs clause, including his proposed powers "[t]o grant charters of incorporation;" "[t]o establish an University;" and "[t]o encourage, by proper premiums & provisions, the advancement of useful knowledge and discoveries." 2 FARRAND, *supra* note 2, at 325 (Aug. 18, 1787) (Madison).

397. *See supra* text accompanying notes 290-295.

398. *E.g.*, Clinton, *Supremacy*, *supra* note 2, at 132-33 (inferring the meaning of the Indian Commerce Clause from Madison's views); WILKINSON, *supra* note 2, at 12 n.27 (relying on a loose paraphrase of Madison's views).

399. *See supra* Part II.C. (discussing the Convention and Madison's role). Misunderstanding this, one writer has claimed that "the debates do not show that the Convention regarded the change from [Madison's proposed language of] 'affairs' to 'commerce' as in any way narrowing the proposed power to deal with the Indians." Stern, *supra* note 2, at 1342. This, of course, is incorrect, given the very different eighteenth-century meanings of "commerce" and "affairs." *See supra* notes 105-110 and accompanying text. Another objection to Stern's comment is that it places the burden of proof on the wrong party, for a change in wording generally denotes a change in intent. *E.g.*, Cazzanigi v. Gen. Elec. Credit Corp., 938 P.2d 819, 825 (Wash. 1997) ("[A] difference in language indicates a difference in legislative intent."); *see also* Am. Airlines, Inc. v. County of San Mateo, 912 P.2d 1198, 1217 (Cal. 1996) (declining to import same meaning to different terms).

than the ratifying public. The convention's final draft granted the new federal government less authority than Madison had desired.[400] The ratification bargain granted still less. And, of course, not even Madison suggested granting Congress plenary dominion over the Indians. His proposal was for Congress to "regulate affairs *with* the Indians"—to govern transactions between tribes and citizens. Yet this still was more than the convention or the public was willing to accept.

A more accurate bellwether of convention sentiment was a delegate such as John Rutledge of South Carolina. A leading moderate, Rutledge had enjoyed a distinguished career as South Carolina's premier lawyer, then as governor and chancellor.[401] He served on the Committee of Detail that altered the convention's resolutions of broad federal power into an enumeration.[402] He represented a state that had been the leader in developing Indian trade laws.[403] It was Rutledge who initially suggested within the Committee of Detail a federal power regarding the Indians.[404] While serving as committee spokesman, it was he who delivered the report to the convention that stripped down Madison's proposal to a mere commerce power.[405] He likely favored Madison's motion to ban state embargoes, but probably voted against Madison's effort to absolutely prohibit state import duties.[406]

D. Errors of Historical Anachronism

1. Errors of Language

Constitutional scholars must be careful not to equate eighteenth-century English with modern English. Eighteenth-century English differed in various ways, particularly in its closer affinity to Latin roots and usages.[407] Before one relies on the presumed meaning of an eighteenth-

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Stern's article, like so much else written in this area, was agenda-driven. He was writing in 1934, and his goal was to justify an expanded construction of the Commerce Clause that would facilitate the New Deal economic program. *See* Stern, *supra* note 2, at 1335 (suggesting that only federal action could cure the Depression).

400. MCDONALD, *supra* note 2, at 205-09 (showing that the finished Constitution was far different from, and less nationalist than, Madison's proposals).

401. For Rutledge's career, see JAMES HAW, JOHN AND EDWARD RUTLEDGE OF SOUTH CAROLINA (1997). The only full-length biography devoted exclusively to John Rutledge, RICHARD BARRY, MR. RUTLEDGE OF SOUTH CAROLINA (1942), is unreliable.

402. 2 FARRAND, *supra* note 2, at 97 (Jul. 24, 1787) (Journal).

403. *See supra* text accompanying notes 268-269.

404. 2 FARRAND, *supra* note 2, at 143 (Jun. 19 – Jul. 23, 1787) (Committee of Detail).

405. *Id.* at 366-67 (Aug. 22, 1787) (Journal).

406. This is an inference based on how the South Carolina delegation, of which he was the leader, voted on these issues. *Id.* at 441 (Aug. 28, 1787) (Madison) (showing a positive vote on Madison's embargo proposal and negative vote on his impost motion).

407. GARRY WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE 93 (1979) (discussing the Latinate English of the founding generation); MCDONALD, *supra* note 2, at xi (stating that in understanding the Founding Era, "a rudimentary knowledge of Latin is highly useful; after all, every educated Englishman and American knew Latin, English words were generally closer

century usage, it is advisable to consult contemporaneous dictionaries and literary sources.[408]

The fact that members of the founding generation often spoke of the tribes as "nations" has induced some to conclude that the Founders "regarded Indian tribes as sovereign nations, with the ability to make war, treaties, and laws for their own people."[409] From this it has been inferred that American governments had no political jurisdiction over tribes within their borders.[410] Yet as noted earlier, colonial and state governments *did* exercise police powers over Indians within their borders, including tribal Indians.

Referring to tribes as "nations" was consistent with exercising political jurisdiction over them because at the time the word "nation" did not necessarily evoke the association with political sovereignty it evokes today. The more common meaning of "nation" followed its Latin root, *natio*, in referring merely to a people or ethnic group or the inhabitants of a general territory.[411] In his famous *Dictionary* of 1756, Samuel Johnson defined "nation" as, "[a] people distinguished from another people."[412] Similarly, Nicholas Bailey's 1783 *Dictionary* defined "nation" as "[t]he *people* of any particular country" and only secondarily as "the country itself."[413] Hence, a North Carolina legislator might simultaneously think of the Cherokees as a "nation" yet vote to apply North Carolina law to Cherokees living within state borders.

To be sure, the contemporaneous definition of "nation" did not *exclude* the possibility that some tribes were thought of as sovereign. A member of the founding generation might well think of some tribes as sovereign entities. But one cannot generalize from the use of the word "nation" to a conclusion that the Founders thought all tribes were sovereign.

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in meaning to their Latin originals than they are today, and sometimes . . . it is apparent than an author is accustomed to formulating his thoughts in Latin").

408. *Cf. supra* text accompanying notes 105-110 (comparing the contemporaneous meanings of "commerce" and "affairs").

409. Prakash, *Fungibility*, *supra* note 2, at 1082.

410. *Id.* at 1082-86 (arguing that the Founders saw the Indian tribes as sovereign nations, outside governmental jurisdiction in the United States).

411. In prior writings, *e.g.*, Natelson, *Commerce*, *supra* note 2, at 830-31, I have mentioned that knowledge of Latin may be a prerequisite to competent constitutional scholarship, in part because of such linguistic considerations as those mentioned in the text and in part because contemporaneous education consisted largely of Latin and other classical studies. The instance in the text is a good example: I might not have thought to check the eighteenth-century definition of "nation" had I not known that its Latin equivalent, *natio*, means a race or people, and has little or nothing to do with sovereignty.

412. 1 JOHNSON, DICTIONARY, *supra* note 2 (unpaginated) (defining "nation").

413. BAILEY, DICTIONARY, *supra* note 2 (unpaginated) (defining "nation"). *But see* ALLEN, DICTIONARY, *supra* note 2 (unpaginated) (defining "nation" as "a number of people inhabiting a certain extent of ground, and under the same government; a government or kingdom").

2. Unfamiliarity with Founding-Era Values

The Constitution excludes "Indians not taxed" from representation of states in the House of Representatives.[414] This has led some writers to assume that all Indians not taxed were necessarily outside state or federal political jurisdiction.[415] The error lies in overlooking the fact that during the Founding Era, representation was not nearly as congruent with political jurisdiction as it is today.

An important reason for excluding a group from representation was the perception that members of the excluded group were too dependent on others to exercise independent political judgment—that giving them the power to elect representatives would have the mere effect of granting extra votes to those upon whom they depended. This was a principal justification for excluding paupers, children, slaves, and (in most states[416]) women from the franchise.[417]

By the time the Constitution was drafted, some tribes already had entered into dependent relationships with the state or national government.[418] Irrespective of whether those tribes were within the political jurisdiction of the federal or state governments, the Founders would not have thought tribal members sufficiently independent to make political decisions in a free republic. But paying taxes was an obvious sign of independence. Hence the Constitution requires representation in a state's congressional delegation for Indians who do pay taxes.

3. Employment of Sources Out-of-Time: *Worcester v. Georgia*

Chief Justice Marshall's decision in *Worcester v. Georgia*[419] is sometimes cited for the proposition that federal jurisdiction over Indian affairs is exclusive.[420] *Worcester* might have had some probative value

414. U.S. CONST. art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, *and excluding Indians not taxed*, three-fifths of all other Persons.") (emphasis added).

415. *See, e.g.*, DELORIA & LYTLE, *supra* note 2, at 3 (claiming that "Indians not taxed" were "outside the reach of American sovereignty and its taxing power). Unfortunately, Professor Prakash, in an otherwise excellent article, falls into the same error. *See* Prakash, *Fungibility*, *supra* note 2, at 1083 (relying on Elk v. Wilkins, 112 U.S. 94, 99 (1884), a case obviously arising long after the Founding).

416. Women who were freeholders and heads of families could vote in New Jersey. Judith Apter Klinghoffer & Lois Elks, *"The Petticoat Electors": Women's Suffrage in New Jersey, 1776-1807*, 12 J. EARLY REPUBLIC 159, 164 (1992).

417. *See generally* Robert G. Natelson, *A Reminder: The Constitutional Values of Sympathy and Independence*, 91 KY. L.J. 353, 382-90 (2003) (discussing the Founders' view of the role of citizen independence in a republic).

418. For example, by the Hopewell treaties. *See supra* text accompanying notes 372-374.

419. 31 U.S. (6 Pet.) 515 (1832).

420. *E.g.*, Clinton, *Review*, *supra* note 2, at 858 (stating of *Worcester* that "Chief Justice Marshall correctly reflected the decision of the framers of the Constitution to vest sole and exclusive

of the original understanding if Marshall (a leading ratifier himself) had discussed what that understanding was. But he did not. The decision tells us nothing about what the ratifiers understood forty-three years earlier.

This is hardly surprising, since there was no need to investigate the constitutional question: the Court's holding was mandated by two treaties governing the case, treaties Marshall recited at length.[421] They provided that (1) Congress would "have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as they think proper,"[422] while (2) the Cherokees would deal only with the federal government, and not with any other sovereigns.[423]

Marshall thus justified his conclusion primarily by reciting applicable "laws and treaties" as well as the Constitution."[424] Only at one point did he seem to indicate that the exclusive power of Congress arose from the Constitution alone;[425] but that statement was dictum, and unsupported by citation or argument.

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power of managing the bilateral relations with the Indians – 'Commerce . . . with the Indian Tribes' – in the federal government").

421. *Worcester*, 31 U.S. (6 Pet.) at 551-56.

422. *See* Treaty with the Cherokee art. III, Nov. 28, 1785, 7 Stat. 18, *reprinted in* KAPPLER, *supra* note 2, at 9 ("The said Indians for themselves and their respective tribes and towns do acknowledge all the Cherokees to be under the protection of the United States of America, and of no other sovereign whosoever."); *id.* at art. IX, *reprinted in* KAPPLER, *supra* note 2, at 10 ("Article IX . . . the United States in Congress assembled shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as they think proper."). *See also* Treaty with the Cherokee art. II, July 2, 1791, 7 Stat. 39, *reprinted in* KAPPLER, *supra* note 2, at 29 ("The undersigned Chiefs and Warriors . . . do acknowledge themselves and the said Cherokee nation, to be under the protection of the said United States of America, and of no other sovereign whosoever; and they also stipulate that the said Cherokee nation will not hold any treaty with any foreign power, individual state, or with individuals of any state."); *see also id.* at art. VI, *reprinted in* KAPPLER, *supra* note 2, at 30 ("It is agreed on the part of the Cherokees, that the United States shall have the sole and exclusive right of regulating their trade.").

423. Treaty with the Cherokee art. III, Nov. 28, 1785, 7 Stat. 18, *reprinted in* KAPPLER, *supra* note 2, at 9; Treaty with the Cherokee art. II, July 2, 1791, 7 Stat. 39, *reprinted in id.* at 29 (agreeing that the Cherokees would be "under the protection of the said United States of America, and of no other sovereign whosoever").

424. *Worcester*, 31 U.S. (6 Pet.) at 562-63 (holding the Georgia law to be "repugnant to the *constitution, laws, and treaties* of the United States") (emphasis added). *See also id.* at 557 (referring to exclusivity created "*by treaties and laws*") (emphasis added). Marshall's opinion also referred to the rule of international law that gave Americans the rights to negotiate with local Indians exclusive of the rights of foreign powers. *Id.* at 543-44.

425. *Id.* at 561 (stating that the Georgia statutes "interfere forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our constitution, are committed exclusively to the government of the union"). Justice McLean's concurring opinion is clearer:

> By the constitution, the regulation of commerce among the Indian tribes is given to congress. This power must be considered as exclusively vested in congress, as the power to regulate commerce with foreign nations, to coin money, to establish post offices, and to declare war. It is enumerated in the same section, and belongs to the same class of powers.

Id. at 580-81 (McLean, J., concurring).

E. Mohegan Indians v. Connecticut

Most of the Founders were lawyers,[426] and even among non-lawyers legal knowledge was widespread.[427] Some understanding of eighteenth-century jurisprudence is therefore useful in constitutional interpretation. For example, I previously have referenced the case of *Blankard v. Galdy*,[428] which defined when a conquered people was, and was not, subject to English law.[429]

It has been argued that an interlocutory jurisdictional ruling in *Mohegan Indians v. Connecticut*[430] "represented the start of increased centralization of oversight and control of colonial Indian regulation by the British government."[431] That ruling is offered as one piece of evidence the framers intended federal jurisdiction over Indian affairs to be exclusive.[432]

Mohegan was a very long-running controversy over land titles between Connecticut, the Mohegan Indian tribe, and individual claimants. The Privy Council appointed a series of commissions to resolve the dispute, directing them to judge "according to justice and equity" rather than according to the common law.[433] This raised consternation in Connecticut, because the prescribed procedure would result in litigation of land titles without the right to trial by jury.[434]

In 1743, private title holders demurred to the jurisdiction of the then-sitting commission. They contended that the commission's authorization did not include the power to "call tenants of any lands within this colony into question in a course of equity . . . concerning the right or title

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The defendants also had argued that congressional jurisdiction was exclusive by reason of the Constitution alone. *Id.* at 540 (reporting the Chief Justice as summarizing the defendant's argument).

426. CLINTON ROSSITER, 1787: THE GRAND CONVENTION 79-137 (Eric F. Goldman ed., The Macmillan Company 1966) (providing short biographies of the delegates to the federal convention).

427. DANIEL J. BOORSTEIN, THE AMERICANS: THE COLONIAL EXPERIENCE 110-36 (Vintage Books 1958) (describing various indicia of the prevalence of legal activity among laymen). *Id.* at 197-202, 205. *See also* LOUIS B. WRIGHT, THE CULTURAL LIFE OF THE AMERICAN COLONIES 1607-1763, at 15 (Harper & Brothers 1957) ("The Maryland planters prided themselves on their familiarity with the principles and practice of law, for legal knowledge was regarded as a necessary accomplishment of a gentleman."). *See also id.* at 128 (stating that "every man had to be his own lawyer").

428. (K.B. 1693) 2 Salk. 411, 91 Eng. Rep. 356.

429. *See supra* note 160 and accompanying text.

430. The case is unreported. *See* SMITH, *supra* note 2, at 422-42 (containing an extensive summary).

431. Clinton, *Dormant*, *supra* note 2, at 1068.

432. *Id.* at 1058. Stating as to the part of his article in which his discussion of *Mohegan* appears:

> Part III will discuss the colonial and confederation period history surrounding the adoption of the Indian Commerce Clause to demonstrate that . . . the primary purpose of that clause was to assure that the federal government had exclusive power to deal with Indian tribes and that states could no longer pretend to exercise any authority in Indian country.

Id.

433. SMITH, *supra* note 2, at 425.

434. *Id.* at 427.

of the said tenants to any lands" or to determine their legal rights.[435] They further contended that if the authorization did include equitable power to adjudicate land titles, then it was illegal, for it violated both the laws of England and the Connecticut charter. Both English and Connecticut authority required that land titles and possession be adjudicated according to the common law, with its guarantee of trial by jury.[436] This the landholders claimed as their "undoubted birthright and inheritance."[437]

In their ruling on the demurrer, the three commissioners split. Two ruled for the Mohegans on the ground that "[t]he Indians, though living amongst the king's subjects . . . are a *separate and distinct people from them*, and they are treated as such, *they have a polity of their own,* they make peace and war with any nation of Indians when they think fit, *without controul* [*sic*] from the English."[438] Thus, any dispute between them and English subjects "cannot be determined by the laws of our land, but by a law *equal to both parties,* which is the law of *nature and nations*."[439] The commissioners might have noted, although they did not, that Connecticut itself had treated the Mohegans as sovereign insofar as the colony had concluded treaties with the tribe.[440]

There was a sharp dissent from the president of the commission. "I can in no matter consider the Mohegan Indians as a *separate or sovereign state*," he wrote.[441] "[S]uch a position in this country, where the state and condition of Indians are known to every body, would be exposing majesty and sovereignty to ridicule. . . ."[442] The Mohegans before the court were but British subjects, "enjoying both the benefit and protection of the English law, and all the privileges of British subjects. . . . When *special powers* out of the course of the common law are given to commissioners for particular purposes, those powers are strictly to be pursued, and can in no manner be inlarged [*sic*] by implication . . ."[443]

It is difficult to find evidence that the ruling in *Mohegan* represented any sort of shift from local to central control over Indian affairs. As noted earlier, the individual colonies retained substantial jurisdiction over local Indian affairs, especially over Indian commerce, throughout the entire period of British rule.[444] Moreover, while the ruling had incidental consequences for the jurisdiction of one commission, it was not

435. MOHEGAN PROCEEDINGS, *supra* note 2, at 124.
436. SMITH, *supra* note 2, at 434.
437. MOHEGAN PROCEEDINGS, *supra* note 2, at 124.
438. *Id.* at 126.
439. *Id.* at 127; SMITH, *supra* note 2, at 434. Smith's quotations from the commission's proceedings are more in the nature of paraphrase than quotation.
440. SMITH, *supra* note 2, at 424, 427-28.
441. MOHEGAN PROCEEDINGS, *supra* note 2, at 128.
442. *Id.*
443. *Id.*
444. *See supra* Parts II.B.2-3.

really about which level of government should control Indian affairs. It was about what body of jurisprudence—law or equity—any tribunal adjudicating Indian title claims should employ. Such disputes had been common throughout the history of the English court system.[445] However, individual colonies could and often did deal with the tribes under international law, as Connecticut itself had done by signing treaties with this very tribe.[446]

As a purely legal matter, the jurisdictional ruling had little significance. The *Mohegan* commission was not a court, nor was it staffed by judges. It was an *ad hoc* colonial commission appointed by the Privy Council. Joseph Henry Smith, the most thorough historian of the controversy, has pointed out that the Privy Council (and *a fortiori* its subordinate commissions) lay outside the regularly-constituted court system, and most of its decisions had only limited precedential force.[447] Even the Council never reviewed the ruling on appeal, for the Indians lost on the merits.[448]

No court reporter found *Mohegan* worthy of reproduction. It was an unreported decision in a legal environment in which "lawyers habitually clung to English printed precedents."[449] My own survey of English and American legal databases confirms that *Mohegan* remained not only unreported, but was utterly unreferenced in any case reports before or during the Founding Era.[450]

If the *Mohegan* ruling has any probative force on the constitutional scope of federal Indian powers, that force arises from the influence of the case, if any, on the outlook of those who approved the Constitution. At least one significant Founder, William Samuel Johnson of Connecticut, had formed an opinion on the ruling, and that opinion was a negative one. During the 1760s, Johnson represented his colony in later *Mohegan* proceedings, and while not involved in the jurisdictional issue as an advocate, he let it be known he found the jurisdictional ruling ludicrous. He wrote that "the Mohegans were neither free, Independent, nor numerous"[451] and that Connecticut had for some time governed them with laws "which subject them to Punishment for Immoralities and crimes, and

445. *E.g.*, PLUCKNETT, *supra* note 2, at 193-98 (describing the conflict under the Stuart kings).

446. *See supra* note 440 and accompanying text.

447. SMITH, *supra* note 2, at 464. One might argue that the decision was "constitutional" and therefore should have had some force, but there is no particular evidence that it did. *See also* PLUCKNETT, *supra* note 2, at 206 (stating that the Council "was constantly reduced to impotence by the sturdy provincialism of courts which declined to recognise [sic] its authority").

448. SMITH, *supra* note 2, at 435-36.

449. *Id.* at 464. Professor Clinton, who relies on the case, duly acknowledges that it was unpublished. Clinton, *Dormant*, *supra* note 2, at 1067 n.23.

450. A search in HeinOnline for "ENGLISH REPORTS (FULL REPRINT (1220-1865))" reveals no report of or reference to the case before 1800. A search in Westlaw of the "ALLSTATES-OLD" and "ALLFEDS-OLD" databases yielded the same result.

451. SMITH, *supra* note 2, at 434 n.109.

enact various regulations with respect to them."[452] "This Notion of their being free States," he said, "is perfectly ridiculous and absurd."[453]

Thus, it can be inferred that Johnson would not have wanted such a ruling enshrined in the Constitution. As evidence of constitutional meaning, his views are entitled to at least some weight. A widely-respected figure, he served in the Stamp Act Congress and the Confederation Congress, and was a key delegate both to the 1787 federal convention[454] and to the Connecticut ratifying convention.[455] That there were others who thought like him can be deduced indirectly from the esteem in which he was held and directly from the wording of the Declaration of Independence. For the Declaration lists as a principal grievance against the Crown precisely the ground for landholders' challenge to the *Mohegan* commission: deprivation "of the benefits of trial by jury."[456]

V. CONCLUSION

This Article has examined the original meaning and original understanding of the Indian Commerce Clause, employing the best historical tools available for that purpose. In this instance, the original meaning and original understanding were identical. The Indian Commerce Clause was adopted to grant Congress power to regulate Indian trade between people under state or federal jurisdiction and the tribes, whether or not under state or federal jurisdiction. Within its sphere, the Clause provided Congress with authority to override state laws. It did not otherwise abolish or alter the pre-existing state commercial and police power over Indians within state borders. It did not grant to Congress a police power over the Indians, nor a general power to otherwise intervene in tribal affairs.

Other provisions in the Constitution granted the federal government considerable competence in the field of Indian affairs. The Article IV Territories and Property Clause conferred on Congress significant power

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452. *Id.*

453. *Id.* at 435 n.109.

454. Dr. Johnson was one of three in the pivotal Connecticut delegation, and played a moderate, constructive part throughout the convention. He also was one of five on the Committee of Style, which put the document in final form. The respect with which he was held can be gauged by the copious talent of those elected to serve with him on that committee: Madison, Hamilton, Rufus King, and Gouverneur Morris. 2 FARRAND, *supra* note 2, at 553 (Sept. 8, 1787) (Madison).

455. 1 FARRAND, *supra* note 2, at 76 (Jun. 2, 1787) (Journal) (noting Johnson's attendance at the federal convention); *Connecticut's Ratification*, THE U.S. CONSTITUTION ONLINE, http://www.usconstitution.net/rat_ct.html (last visited November 3, 2007) (listing Johnson as a ratification convention delegate). Subsequently, he served in the United States Senate, and as president of Columbia University. For general biographies, see Robert M. Calhoon, *Johnson, William Samuel*, *in* THE OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (2004-07); ELIZABETH P. MCCAUGHEY, FROM LOYALIST TO FOUNDING FATHER: THE POLITICAL ODYSSEY OF WILLIAM SAMUEL JOHNSON (1980); GEORGE C. GROCE, JR., WILLIAM SAMUEL JOHNSON: A MAKER OF THE CONSTITUTION (1937).

456. THE DECLARATION OF INDEPENDENCE para. 20 (1776) ("For depriving us, in many cases, of the benefit of Trial by Jury.").

over Indians residing in a federal territory or on federal land within state boundaries. Under the Treaty Power, agencies of the federal government could exercise authority over a tribe if the tribe so agreed. By treaty, states could be entirely or partially divested of their jurisdiction over a tribe. The treaty mechanism protected tribes from arbitrary assumption of federal power, for a tribe had to agree to a treaty. The treaty mechanism also protected the states from inappropriate divesting of their authority, for two-thirds of their delegates in the United States Senate had to concur. Finally, the results of textual and historical analysis militate overwhelmingly against the federal government having any "inherent sovereign power" over Indians or their tribes.

No doubt people who work in the area of Indian law will have mixed feelings about these conclusions. Some will embrace my conclusion that the tribes are entitled to a wide scope of autonomy from federal control, while others may fear that I have put federal Indian welfare programs under a constitutional cloud.[457] Few will be pleased with the finding that the Founders intended the states to retain their broad residual police power, although there are reasons for re-thinking that position.[458] Some may, or may not, appreciate the implied suggestion that federal Indian policy should be made less through congressional legislation and more through tribe-by-tribe treaty negotiations.

Scholarly investigations should not be held hostage to political views, and I have not allowed them to skew the findings of this investigation. If the investigation be factually sound, then I hope readers will acknowledge that, and pursue their goals within that context.

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457. Fletcher, *Federal Indian Policy*, *supra* note 2, at 165 ("The plenary power of Congress in Indian affairs has generated an enormous amount of vociferous scholarly debate in the federal Indian law academic community, with the argument that Congress has no business regulating at least the internal affairs of Indian tribes being most popular.").

458. Strategically, Indian activists might be better positioned to achieve their goals after a devolution of power over Native affairs to the states. As of 1990, Indians, Eskimos, and Aleuts together comprised only 0.8 percent of the national population subject to congressional jurisdiction. But the states in which most Indians live, and the states with significant reservations, have populations in which Native representation is far higher. Chart 129, *Population, by State, Geographic Region, and Race/Ethnicity, 1990*, *in* STATISTICAL RECORD OF NATIVE NORTH AMERICANS, *supra* note 2, at 224-25 (showing that in 1990, only 0.8 percent of the national population was Indian, Eskimo, or Aleut, but that in significant reservation states, the percentages were higher – *e.g.*, 6.0 percent in Montana, 8.9 percent in New Mexico, and 8.0 percent in Oklahoma). Whatever the history of state legislatures when Indians were substantially without representation, today the incentives for favorable treatment of such large in-state minorities are likely to be significant.

SEPARATE POWERS–SHARED RESPONSIBILITY:† CONSTRUCTING AVENUES OF INTERBRANCH COMMUNICATION

RUSSELL CARPARELLI††

INTRODUCTION

In The Federalist No. 78, Alexander Hamilton wrote that the courts must exercise judgment to effect the constitutional intentions of the legislature and must not exercise will to substitute their preferences for those of the legislative body.[1] Since Hamilton first expressed this principle, scholars and jurists have written countless books, articles, and opinions about the separation of powers and how courts should go about exercising their judgment to effect legislative intent. Less has been written about how legislatures and courts can work together to the same end. This article calls for increased efforts to re-evaluate and re-vitalize existing avenues of communication between the legislature and courts in Colorado and other states, and to develop new ones, both formal and informal, to increase the effectiveness and efficiency of state governments.

I. THE NEED FOR INTERBRANCH COMMUNICATION

The Colorado Constitution prohibits any person or persons charged with the exercise of powers properly belonging to one governmental branch from exercising any power properly belonging to either of the others.[2] However, as Benjamin Cardozo wrote, it is not necessary that the "[l]egislature and courts move on in proud and silent isolation."[3] Not only is such isolation unnecessary, but, as Robert A. Katzmann has noted, governance "is premised on each institution's respect for and knowledge of the others and on a continuing dialogue that produces shared understanding and comity."[4] The three branches of government cannot govern without understanding and respecting the others' powers,

† "Separate Powers–Shared Responsibility" was derived from remarks by Joseph R. Quinn, Chief Justice of the Colorado Supreme Court, in 1989. *See infra* note 17.

†† Judge, Colorado Court of Appeals. I thank my summer intern Matt Dardenne for his research, communication and coordination with other government entities, and drafting; and the Court of Appeals editor Wendy Busch for contributing her extraordinary editing skill.

1. THE FEDERALIST NO. 78 (Alexander Hamilton).
2. COLO. CONST. art. III.
3. Benjamin Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 114 (1921).
4. ROBERT A. KATZMANN, COURTS AND CONGRESS 1 (1997).

constraints, and methods.[5] The premise here is that effective formal and informal interbranch communication helps each branch better understand the workings of others, promotes respect for the separation of powers, can help manage the tensions inherent in our checks and balances system, and improves government.[6]

The factors that tend to discourage communications between courts and legislatures have been thoroughly described by Katzmann, Shirley Abrahamson, Deanell Reece Tacha, and others, and need not be repeated here.[7] However, the need to construct additional avenues of interbranch communication remains and has been increased by recent legislative challenges, efforts to modify statutes through litigation, the accelerated transmission of information, and political rancor.

A. Challenges of Governing

State governments continue to face challenges that include population growth, changing demographics, security concerns, persistent and emerging public health issues, infrastructure demands, budget limitations, the need for economic growth, and public debate regarding fundamental values. In many states, legislative term limits cap the experience level of legislative bodies, yet legislators must effectively address the concerns of their constituents and of the general public. Because term limits increase the turnover rate in the legislature, "institutional memory" is shorter, and programs to provide legislators with necessary information must be repeated more frequently and more efficiently. Tight budgets reduce legislative staff resources and increase the need to rely on private resources that can be accessed by lobbyists.

B. Litigation

When legislatures draft statutes, to what extent do they endeavor to limit or leave open the potential for litigation by the same special interests that were involved in the legislative drafting process? Although legislatures and the judiciary are aware of the effects of the adversarial process and communicate about possible substantive and procedural reforms, legislative discontent with the courts might be assuaged by

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5. Peter M. Shane, *Policy at the Intersection of Law and Politics: Panel One: When Inter-Branch Norms Break Down: Of Arms-For-Hostages, "Orderly Shutdowns," Presidential Impeachments, and Judicial "Coups,"* 12 CORNELL J.L. & PUB. POL'Y 503, 506-08 (2003).

6. Robert A. Katzmann, *The Underlying Concerns*, *in* JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 10 (Robert A. Katzmann ed., 1988).

7. *See* Shirley S. Abrahamson, *Remarks of the Hon. Shirley S. Abrahamson Before the American Bar Association Commission on Separation of Powers and Judicial Independence*, 12 ST. JOHN'S J. LEGAL COMMENT. 69, 80-91 (1996); Shirley S. Abrahamson & Robert L. Hughes, *Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation*, 75 MINN. L. REV. 1045, 1046-47 (1991); Katzmann, *supra* note 4, at 4-7; Robert A. Katzmann, *Bridging the Statutory Gulf Between Courts and Congress: A Challenge of Positive Political Theory*, 80 GEO. L.J. 653, 655-56 (1992); Deanell Reece Tacha, *Judges and Legislators: Renewing the Relationship*, 52 OHIO ST. L.J. 279, 281 (1991).

broader recognition that the general public, corporations, and organized advocacy groups often continue their efforts to obtain laws favorable to them by filing lawsuits that seek to narrow or broaden the statutes' scope. Thus, like lobbyists, litigants and their advocates are active participants in the lawmaking process.[8]

And, although legislators are aware that, regardless of litigants' goals, the courts will interpret and apply the laws they draft, how many know or are attentive to the canons the courts will use to interpret those laws?[9] As Professor Kagan has observed, after losing in the courts, some litigants again lobby legislatures to revisit the statutes to undo the courts' interpretations.[10] After the legislature revises a statute, the policy debate can again return to the courts.

C. *Information Highway*

Although state legislatures have faced demanding challenges throughout American history, since the creation of the World Wide Web in 1991 and the proliferation of dial-up and high speed Internet service since 1995,[11] our governments face these challenges in the fastest communications environment in history and, in turn, under increased public scrutiny and involvement. The decisions and actions of all branches of government are disseminated at lightning speed and are swiftly analyzed and debated in the traditional media and rapidly growing cyber-media.[12]

D. *Political Rancor*

There are, have always been, and always will be, groups, citizens, and legislators who believe court decisions are frequently based on political views, rather than legal principles. Recent criticism of controversial court decisions has been vociferous.[13] Reflecting anger, distrust, and

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8. ROBERT A. KAGAN, MAKING POLICY, MAKING LAW: AN INTERBRANCH PERSPECTIVE 14 (Jeb Barnes & Mark C. Miller, eds., 2004).

9. Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 806 (1983). Posner has also observed that:

> [T]he [basic] reason why statutes are so frequently ambiguous in application is not that they are poorly drafted—though many are—and not that the legislators failed to agree on just what they wanted to accomplish in the statute—though often they do fail—but that a statute necessarily is drafted in advance of, and with imperfect appreciation for the problems that will be encountered in, its application.

Id. at 811.

10. KAGAN, *supra* note 8, at 14.

11. Robert Hobbes Zakon, Hobbes' Internet Timeline v8.2 (2006), http://www.zakon.org/robert/internet/timeline/#1990s.

12. At the same time, public confidence in the United States Congress and the United States Supreme Court has fallen dramatically. Frank Newport, *Americans' Confidence in Congress at All-Time Low*, THE GALLUP POLL, June 21, 2007, *available at* http://www.galluppoll.com/content/?ci=27946 (Americans with a "great deal" or "quite a lot" of confidence in Congress at 14%, down from 22% in 1997 and one of the lowest ratings for any institution tested in 30 years; ratings for the U.S. Supreme Court were 34%, down from 50% in 1997; for the President 25%, down from 52% in 2004).

13. In April 2005, U.S. House Majority Leader Tom DeLay of Texas caused the U.S. Congress and federal courts to become involved in the case of Terri Schiavo. After the federal courts

misunderstanding of the judicial process, rhetoric of this sort tends to increase the politicization of the judicial system, rather than reduce it. It also promotes public disrespect for the rule of law and a co-equal branch of government. That is not to say that courts do not err, or that decisions should not be subject to public debate. Rather, it is to say that the vehemence of current debate regarding the role of the courts increases the need for legislatures and courts to build more avenues of communication and to ensure that they are well used.

In this environment, the public would not be well served by three branches of government moving in proud isolation. To the contrary, our rapidly changing, rapidly communicating world makes interbranch communication more necessary than ever before. Each member of each branch needs to have a sound understanding of how the others function and are evolving in response to new challenges and new perspectives within their branches and in the electorate. Although courts regularly interpret and apply the laws passed by legislatures, do judges know enough about the formal and informal political dynamics of legislative processes?[14]

II. "SEEKING A NEW PARTNERSHIP," CONFERENCES AND A GUIDEBOOK

In 1989, seven organizations sponsored a national conference in Denver, Colorado, entitled "Legislative-Judicial Relationships: Seeking a New Partnership."[15] The conference sought to provide a foundation for more substantial working relationships between state legislatures and the courts. The Honorable Robert F. Stephens, Chief Justice of the Kentucky Supreme Court, commented that the conference was a historic first attempt to discuss openly and candidly the problem that exists between the two branches of government, and that it was an opportunity to create mutual understanding of the problems and attitudes underlying inter-

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declined to exceed their jurisdiction and a special grant of authority from Congress, DeLay said, "The time will come for the men responsible for this to answer for their behavior," and noted that he wanted to "look at an arrogant, out-of-control, unaccountable judiciary that thumbed their nose at Congress and the president." Mike Allen, *DeLay Wants Panel to Review Role of Courts: Democrats Criticize His Attack on Judges*, WASH. POST, Apr. 2, 2005, at A09. That same month, Senator John Cornyn spoke to a nearly empty chamber, criticized a Supreme Court ruling on the death penalty, and said that he wondered whether political decisions by the courts without accountability to the public had resulted in violence against judges. Charles Babington, *Senator Links Violence to "Political" Decisions*, WASH. POST, Apr. 5, 2005, at A07.

14. Posner, *supra* note 9, at 809.

15. The conference was held in Denver, Colorado, on October 1-3, 1989, and was sponsored by the National Center for State Courts, the National Conference of State Legislatures, the Conference of Chief Justices, the Conference of State Court Administrators, the Council of State Governments, and the American Bar Association Judicial Administration Division—Lawyer's Conference. *See* NANCY C. MARON, LINDA K. RIDGE, JOHN MARTIN & CAROL FRIESEN, LEGISLATIVE-JUDICIAL RELATIONS: "SEEKING A NEW PARTNERSHIP:" CONFERENCE SUMMARY REPORT (1989), *available at* http://www.ncsconline.org/WC/Publications/KIS_IntRelConferenceSum.pdf. [hereinafter MARON, CONFERENCE REPORT].

branch friction and to help both branches work together effectively to better serve the public, "which we all serve."[16]

Given the location of the 1989 conference, it is no surprise that Colorado's legislative, judicial, and legal education communities were well represented.[17] Chief Justice Joseph R. Quinn and Colorado Senate President Ted Strickland made welcoming remarks. Chief Justice Quinn stressed that the separation of powers should be viewed as "shared responsibility."[18] Participants were encouraged "to think less in terms of 'separation' and 'power' and more in terms of common goals and communications."[19] Chief Justice Quinn commented that because the courts' interpretation of statutes is based on the words in the statute, it is important that the legislature express its intent as clearly as possible.[20] Edward A. Dauer, a professor at University of Denver College of Law, sounded a similar theme when he said that "despite, or maybe because of, [the] principle of separation of powers, there are numerous needs and opportunities for the legislative and judicial branches nonetheless to interact," but that "in all those interactions, the two branches do not always fully appreciate the constraints, limits, incentives, motivations, and attributes of the other branch."[21]

Among the eight recommendations that emerged from the conference was a recommendation to hold regional and state conferences, similar in format to the national one, to focus on the relationships between individual state legislatures and courts.[22]

In 1991, regional conferences were conducted in Helena, Montana,[23] and Boston, Massachusetts.[24] The project staff conducted follow-

16. LINDA K. RIDGE, DONNA HUNZEKER, ANTOINETTE BONNACI-MILLER & MARY FAIRCHILD, LEGISLATIVE-JUDICIAL RELATIONS: "SEEKING A NEW PARTNERSHIP:" A GUIDEBOOK FOR LEGISLATIVE-JUDICIAL RELATIONS 8 (1992), *available at* http://www.ncsconline.org/WC/Publications/KIS_IntRelPartnership.pdf [hereinafter RIDGE, GUIDEBOOK].

17. State Senator Dottie Wham and University of Denver College of Law Professor Robert B. Yegge were on the advisory planning committee. MARON, CONFERENCE REPORT, *supra* note 15, at app. C. The faculty included Professor Edward A. Dauer of the University of Denver College of Law; Honorable Jean E. Dubofsky, former associate justice of the Supreme Court of Colorado; Honorable Richard D. Lamm, Director of the University of Denver Center for Pub. Policy and Contemporary Issues; and former Governor of Colorado; Gene Murrett, Circuit Executive for the Tenth Circuit Court of Appeals; Honorable Joseph R. Quinn, Chief Justice of the Supreme Court of Colorado; and Honorable Ted Strickland, President of the Colorado State Senate. *Id.* Attendees included State Representative Marleen Fish and Chief Judge Aurel M. Kelly of the Colorado Court of Appeals. *Id.*

18. MARON, CONFERENCE REPORT, *supra* note 15, at 14.

19. *Id.*

20. *Id.* at 38.

21. RIDGE, GUIDEBOOK, *supra* note 16, at 1-2.

22. MARON, CONFERENCE REPORT, *supra* note 15, at 21-22.

23. RIDGE, GUIDEBOOK, *supra* note 16, at 33. Participants were from Montana, North Dakota, South Dakota, Wyoming, and Idaho. *Id.*

24. *Id.* Participants were from Connecticut, Indiana, Kentucky, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, and Vermont. *Id.*

up interviews of regional conference participants and reported that participants frequently mentioned "the need to spread knowledge and understanding of the issues critical to interbranch relations 'through the ranks.'"[25] According to the conference report, "[t]here was considerable disagreement between legislators and judicial officials about how much communication exist[ed] between the branches [at that time], and what the inducements and impediments to more effective communication might be."[26]

And in 1992, Linda K. Ridge, with others at the National Center for State Courts, prepared "A Guidebook for Legislative-Judicial Relations," which, among other things, provides guidance about how to organize a conference on legislative-judicial relations.[27]

III. WISCONSIN'S COMMISSION ON THE JUDICIARY AS A CO-EQUAL BRANCH

In 1995, Wisconsin State Bar President David Saichek created a Commission on the Judiciary as a Co-Equal Branch of Government.[28] The commission sought to address, among other questions, whether the judicial branch was working well with the other two branches of government.[29] The commission was divided into five committees, one of which addressed interbranch relations.[30]

The commission reported concerns about the relationship among the three branches, including "the need for better understanding by members of the executive and legislative branches of what the courts can and cannot do, as well as what must be done to help the judiciary function more effectively."[31] It also reported concerns that the judiciary needed to be more assertive in understanding the process of legislating.[32] The commission recognized that the legislative and executive branches can be influenced by misconceptions among the public about the judicial branch, and that education about the judiciary's role and independence is vital to all branches.[33] In my view, however, there is an even greater danger that members of the legislative and executive branches who lack accurate understanding about the courts can, and do, negatively influence public confidence in their government and, in particular, in the fairness and impartiality of our courts.

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25. RIDGE, GUIDEBOOK, *supra* note 16, at 34.
26. MARON, CONFERENCE REPORT, *supra* note 15, at 7.
27. *See generally* RIDGE, GUIDEBOOK, *supra* note 16.
28. COMMISSION ON THE JUDICIARY AS A CO-EQUAL BRANCH OF GOVERNMENT, STATE BAR OF WISCONSIN, FINAL REPORT AND RECOMMENDATIONS 12 (1997), available at http://www.wisbar.org/AM/Template.cfm?Section=Research_and_Reports&Template=/CM/ContentDisplay.cfm&ContentID=17447 [hereinafter COMMISSION ON THE JUDICIARY].
29. *Id.*
30. *Id.* at 13.
31. *Id.* at 21.
32. *Id.*
33. *Id.*

IV. AVENUES OF COMMUNICATION IN COLORADO

In October 1990, the State Justice Institute awarded a grant[34] and the Colorado General Assembly appropriated funds to the Colorado Judicial Branch to conduct Project Vision 2020: Colorado Courts of the Future.[35] Eighty Coloradans spent more than a year considering various issues, including the relationship between the courts, the General Assembly, and the executive branch.[36]

One Project Vision 2020 task force that considered the structure of the state courts included professors, state representatives, state senators, judges, and court administrators.[37] The task force envisioned better relationships between the General Assembly and the courts, and also recommended inviting the executive branch into discussions.[38] It called for the creation of an Interbranch Commission consisting of the Governor (or a designee or alternate), the Chief of Staff of the Governor, the majority and minority leaders of the state senate and house, the Chief Justice (or a designee or alternate), the State Court Administrator, one private citizen appointed by each of the three branches, and two private citizens to be chosen by the three appointed citizens members.[39] One of the five appointed private citizens would be elected by the entire commission to serve as Chair.[40] The task force envisioned that the commission could be established by constitutional amendment, statutory action, voluntary action by each branch, or another informal, voluntary method.[41]

The task force acknowledged that the principles of separation of powers and checks and balances must continue, and emphasized that the purpose of "an Interbranch Commission would not be to reduce the independence, autonomy, and customary responsibilities of each of the branches of government."[42] The task force concluded that the state should follow the principle that the three branches are "separate but not separated."[43] However, such a commission does not currently exist.

Since then there have been other task forces and formal avenues of communication. The General Assembly has a tradition of inviting the

34. STEERING COMMITTEE, PROJECT VISION 2020: COLORADO COURTS OF THE FUTURE, REPORT TO THE COLORADO SUPREME COURT 1 (1992) [hereinafter VISION 2020]. The grant was awarded shortly after Chief Justice Joseph R. Quinn stepped down as Chief Justice (though he remained an associate justice until 1993) and Chief Justice Luis Rovira assumed those duties.

35. *Id.*

36. Letter from Laurence W. DeMuth, Jr., Chair of Steering Committee, Vision 2020: Colorado Courts of the Future, to Hon. Luis D. Rovira, Chief Justice, Colorado Supreme Court (Mar. 25, 1992) (on file with Westminster Law Library, University of Denver Sturm College of Law).

37. VISION 2020, *supra* note 34, at 62.

38. *Id.* at 77.

39. *Id.* at 79-80.

40. *Id.* at 80.

41. *Id.*

42. *Id.* at 78 (emphasis in original).

43. *Id.* at 79 (quotation omitted).

Chief Justice to address the Assembly regarding the state of the judiciary at the beginning of each legislative session.[44] These addresses typically include information about the structure of the judicial branch, caseloads of its several components, the challenges it faces and anticipates, the initiatives it has undertaken, and legislation it intends to request.[45] The Office of the State Court Administrator maintains communication with the General Assembly throughout the year, especially with regard to the administration of the courts and proposed legislation.[46]

In 2001, the courts, the legislature, and the executive branch participated in the Governor's Task Force on Civil Justice Reform,[47] which resulted in legislation that added twenty-four new district court judgeships.[48]

From 2005 to 2007, at least two legislators participated in the Respondent Parents' Counsel Task Force Colorado, which Chief Justice Mary Mullarkey created. The task force reviewed issues facing respondent parents' counsel, and made recommendations to the Supreme Court and the Colorado General Assembly.[49]

In 2006, a legislative audit report was highly critical of fees charged by guardians and conservators.[50] As a result of the report, the Chief Justice established the Protective Proceedings Task Force, and charged it with the task of establishing effective procedures and controls for administering and monitoring conservatorships.[51] The task force issued a draft report in September 2007.[52]

In addition to these efforts by the government branches themselves, the Colorado Bar Association has sponsored a half-day program at the beginning of some legislative sessions to provide new legislators with a primer regarding the structure and role of the courts.[53] The Colorado

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44. *See, e.g.*, Mary Mullarkey, Chief Justice, Colorado Supreme Court, State of the Judiciary Address to the General Assembly of Colorado (Jan. 12, 2007).

45. *See id.* at 1.

46. *See* Office of State Court Administrator, Colorado Judicial Branch, http://www.courts.state.co.us/exec/scaoindex.htm.

47. *See* GOVERNOR'S TASK FORCE ON CIVIL JUSTICE REFORM, FINAL REPORT (July 2000), *available at* http://www.state.co.us/cjrtf/report/report.htm.

48. *See* Laird T. Milburn, *CBA President's Message to Members: Citizen's Justice Conference*, 30 Colo. Lawyer 45 (Aug. 2001).

49. RESPONDENT PARENTS' COUNSEL TASK FORCE COLORADO, FINAL REPORT TO THE CHIEF JUSTICE OF THE COLORADO SUPREME COURT 10-35 (2007), *available at* http://www.courts.state.co.us/supct/committees/courtimprovementdocs/Final_Report_9_24_07.pdf.

50. PROTECTIVE PROCEEDINGS TASK FORCE, REPORT TO CHIEF JUSTICE AND STATE COURT ADMINISTRATOR 4 (2007), *available at* http://www.courts.state.co.us/exec/Probate/ReporttoChiefJusticeStateCourtAdministratorFeb282007%20with%20no%20attachments.doc.

51. *Id.*

52. *See* PROTECTIVE PROCEEDINGS TASK FORCE, DRAFT REPORT (2007), *available at* http://www.courts.state.co.us/exec/Probate/SummaryReportDRAFTSept122007.doc.

53. Colorado Bar Association, 3d Annual Legislative Symposium: Colorado's Justice System (Oct. 20, 2005). The last program was conducted at the beginning of the legislative session in Janu-

Supreme Court and the Colorado Bar Association have also supported the formation of the Colorado Access to Justice Commission, which develops, coordinates, and implements policy initiatives to expand access to and enhance the quality of justice in civil legal matters for those who encounter barriers in accessing Colorado's civil justice system.[54] The Access to Justice Commission includes representatives from all three branches of government.[55]

Each of these communications has proved its value. And more can be done, both formally and informally.

V. POSSIBILITIES

The national, regional, and state programs, as well as the authors mentioned earlier, have provided exceptional guidance about ways to increase productive communications among the branches of government. There has been increased communication at the federal and state levels. Colorado has done well. Project Vision 2020, the State of the Judiciary addresses to the General Assembly, the legislative communications work of the Office of the State Court Administrator, and joint task forces have laid a path. Some judicial districts have also found ways to meet with state legislators and local officials.[56] Yet, more can be done and the citizens will benefit when more is done.

2008 is an election year. In 2009 there will be a new president, a new U.S. Congress, a new Colorado General Assembly, and new legislatures in most states. And 2009 will be the twentieth anniversary of the 1989 "Seeking a New Partnership" national conference. We do not need new conferences to design new avenues of communication; rather, we need national, state, and regional conferences that bring participants together to set in motion activities that will maximize the benefits of existing avenues of communication and to establish those that have already been designed but not yet built. Such conferences could also create interstate collaborations that enable state governments to benefit from the experiences of other states. What follows is a summary of some of the work from earlier conferences.

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ary 2005; there was no program at the beginning of the legislative session in 2007. *Id.* The format of the program is educational, but its brevity limits the amount and scope of information that can be presented. In addition, attendance by legislators is voluntary, and, as a result, it is often limited. The program should be resumed and expanded in 2009, and returning incumbent legislators should urge better attendance by all legislators. Attendance by judges other than the speakers would also help to foster continuing informal communication between judges and legislators.

54. *See* Access to Justice Commission, Colorado Bar Association, http://www.cobar.org/index.cfm/ID/20129/DPWAJ/Access-to-Justice-Commission/.

55. *Id.*

56. RIDGE, GUIDEBOOK, *supra* note 16, at 22-24.

A. Education

Our executive, legislative, and judicial officials are all busy carrying out the work of the people. Although the majority of officials come to their positions with significant knowledge, there is no assurance that they know how each branch operates or how the work of each branch relates to that of the others.

As in most efforts to achieve excellence, education and training are essential foundations. And, indeed, all the conferences discussed here have called for more interbranch education.[57] They have called for educational programs that orient branch officials and staff to the procedures, perspectives, and problems of the other branches.[58] The public would benefit if judges knew more about the formal and informal political dynamics involved in the initiation, drafting, consideration, and passage of statutes. The public would also benefit if legislators knew more about the courts and how they interpret statutes and constitutions.

Educational efforts could also facilitate formal and informal interbranch communication by including information about the separation of powers, ways to engage in productive communications without undermining the separation of powers, and the political and ethical constraints of officials in the other branches. Joint educational conferences would promote a better understanding about how each branch is approaching new challenges. Practical education could be achieved through "ride-along" programs where judges invite state legislators, as well as local elected and appointed officials, to observe court proceedings, and where state legislators invite judges to observe public meetings with constituents, as well as legislative committee meetings and hearings.

And as part of the Courts in the Community program,[59] Colorado's appellate courts hear oral arguments in all parts of the state. Local bar associations often host small social functions in conjunction with these events. The courts and bar associations could use these and other opportunities to bring together state and local members of all the branches.

Such education is likely to promote new ideas for formal avenues of communication to augment the State of the Judiciary addresses and communications through the Office of the State Court Administrator.

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57. *See, e.g.*, MARON, CONFERENCE REPORT, *supra* note 15, at 8-9; RIDGE, GUIDEBOOK, *supra* note 16, at app. B, app. C.

58. *See, e.g.*, MARON, CONFERENCE REPORT, *supra* note 15, at 26; RIDGE, GUIDEBOOK, *supra* note 16, at app. B, app. C.

59. Colorado Judicial Branch, Courts in the Community, http://www.courts.state.co.us/exec/pubed/courtsinthecommunity.htm (last visited Nov. 2, 2007).

B. Formal Avenues

New formal avenues should seek to promote efficiency and effectiveness in governmental processes. For example, can legislators draft statutes that are less vulnerable to the risks of modification through litigation and are more likely to be read and understood consistently with legislative intentions and purposes? Are judicial impact statements being used effectively? Are joint committees and task forces being utilized effectively? Might joint conferences be held regarding interbranch relations and emerging public issues? Could legislators be invited to attend or make presentations at annual judicial education conferences? Are there effective means for the courts to draw the legislature's attention to statutory provisions that could be made more clear and, thus, reduce or avoid litigation and the need for judicial interpretation? Are existing avenues of communication primarily at the highest levels of each institution? Are there ways to bring more judges and legislators together throughout each branch? How can the leadership of the legislature and judiciary increase attendance at bar association programs that inform legislators about the courts and the way courts interpret statutes? How can such programs facilitate continuing communications between legislators and judges?

C. Informal and Social Contacts

Increased education and formal communications may well result in increased personal contacts and informal communications between officials of different branches. Such communications would increase the potential for new ideas, and perhaps more important, for mutual understanding and respect. In addition, although officials from each of the branches often attend the same community events, how much more might the public benefit if all three branches gathered at the beginning of each legislative session for a luncheon that celebrated the founders' design of three branches forming one government?

CONCLUSION

"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self[-]appointed, or elective, may justly be pronounced the very definition of tyranny."[60] The task of public officials is to preserve the separation of powers and also to govern effectively and efficiently. We cannot do this without knowing the powers, dynamics, and constraints of the other branches with which we share that responsibility. We could do it better if the avenues of communication, formal and informal, are available, known, and used by each branch and by individual legislators and judges. Avenues that currently address changes in substantive and pro-

60. THE FEDERALIST NO. 47 (James Madison).

cedural laws could be supplemented with avenues that increase mutual understanding and respect for the unique dynamics of the legislative and judicial processes, and the commitment of those in each branch to serve the public in accordance with their sworn duties.

The national, regional, and state conferences in 1989 and the early 1990s designed ways to increase interbranch communications. As we approach the twentieth anniversary of the 1989 conference, perhaps it is time for a series of smaller regional and state interbranch conferences, not to design avenues of communication, but to begin the work of broadening existing avenues of communication, augmenting them with others that have been designed but not yet built, and promoting increased use by individual legislators and judges. It is absurd to think that we could govern effectively and efficiently without them. Yet, too often, it seems we "move on in proud and silent isolation."

ENACTING LIBERTARIAN PROPERTY: OREGON'S MEASURE 37 AND ITS IMPLICATIONS

MICHAEL C. BLUMM[†] & ERIK GRAFE[††]

In November 2004, for the second time in four years, Oregon voters opted for a radical initiative that is transforming development rights in the state. The implications of this substantial change in property rights have yet to be fully realized, but it is clear that the post-2004 land use world in Oregon will be dramatically different than the previous thirty years.

Land development rights in the state were significantly curtailed by a landmark law the Oregon legislature, encouraged by pioneering Governor Tom McCall, enacted in 1973. Implementation of that law survived three separate initiatives that sought to rescind it in the 1970s and 1980s. But after a hiatus of a decade and a half, land planning opponents put on the ballot a scheme that promised landowners either compensation or a regulatory waiver from land use requirements imposed after they—or a family member—acquired the land in question. That 2000 measure, which the voters approved as an amendment to the Oregon Constitution, was struck down by the Oregon Supreme Court for violating the state constitutional requirement that initiatives be limited to only a single subject.

Undaunted, the opponents of Oregon land use planning put another initiative on the ballot in 2004 quite similar to the 2000 initiative, except that this initiative was a statutory amendment, not a constitutional amendment. Thus, it was not burdened by the concerns that led to the 2000 measure's judicial rejection. This measure, known as Measure 37, promises to transform land use regulation in Oregon and the Oregon landscape in the process.

This article explains the background, politics, and implementation of Oregon's experiment in creating what is the leading example of libertarian property in the world. The article examines early judicial and attorney general interpretations of the measure and its predecessor and focuses attention on the many ambiguities in the measure's language, particularly the uncertain scope of its express exceptions from compensation. Measure 37's proponents have attempted to export its principles to other states and, in 2006, Arizona joined Oregon as another labora-

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tory for libertarian property. Finally, as this article was in press, the Oregon electorate approved a referendum aimed at clarifying some of Measure 37's ambiguities, expediting regulatory waivers for small residential developments, and making them transferable, but making commericial, industrial, and large residential developments ineligible for regulatory waivers or compensation.

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INTRODUCTION

In November 2004, Oregon voters adopted Measure 37, an initiative revolutionizing property rights in the state.[1] The initiative was actually the second time in four years the Oregon electorate opted for radical property rights change; an earlier version, passed in 2000, was struck down by the Oregon Supreme Court for violating the state constitution.[2] Despite the radical nature of the initiative—which promised landowners complete compensation for any regulation reducing any value of land imposed after acquisition by the owner or her family—the measure passed easily, with a majority of over 60 percent.[3] It was later upheld by the state supreme court, which overturned a lower court decision,[4] so the measure is now in the process of transforming the Oregon landscape.

Oregon might seem an unlikely place for a property rights revolution to take hold. For over thirty years, the state pursued statewide land use planning on a scale not witnessed in any other American state.[5] This commitment to rational, areawide planning channeled development within urban growth boundaries, preserved rural forest and farmlands, and encouraged efficient infrastructure and transportation planning, of no small significance in a world increasingly concerned with reducing carbon emissions.[6] The Oregon system also interjected the state into a host

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1. Oregon Governments Must Pay Owners or Forgo Enforcement When Certain Land Use Restrictions Reduce Property Value, ch. 197 Ballot Measure 37 (Measure 37) (2004) (codified at OR. REV. STAT. § 197.352 (2005)).

2. Amends Oregon Constitution: Requires Payment to Landowner if Government Regulation Reduces Property Value (Measure 7) (2000), *available at* http://www.sos.state.or.us/elections/nov72000/guide/mea/m7/m7.htmf (struck down as unconstitutional in League of Or. Cities v. State, 56 P.3d 892, 896 (Or. 2002)).

3. Or. Secretary of State, General Election Abstract of Votes on State Measure No. 37 (Nov. 2, 2004), http://www.sos.state.or.us/elections/nov22004/abstract/m37.pdf.

4. MacPherson v. Dep't of Admin. Servs., 130 P.3d 308, 312 (Or. 2006), overturning the circuit court decision, MacPherson v. Dep't of Admin. Servs., No. 05C10444, slip op. at 23 (Marion County Cir. Ct. Oct. 14, 2005), *available at* http://www.ojd.state.or.us/mar/documents/Measure37.pdf; *see infra* notes 172-213 and accompanying text.

5. GERRIT KNAAP & ARTHUR C. NELSON, THE REGULATED LANDSCAPE: LESSONS ON STATE LAND USE PLANNING FROM OREGON 227 (1992) (describing Oregon's land use planning system and noting that it has served as a model to other states); H. JEFFREY LEONARD, MANAGING OREGON'S GROWTH: THE POLITICS OF DEVELOPMENT PLANNING 134-37 (1983) (describing Oregon's land use planning system and noting that it has served as a model to other states). *See generally* PLANNING THE OREGON WAY: A TWENTY YEAR EVALUATION (Carl Abbott, Deborah Howe & Sy Adler eds., 1994).

6. LEONARD, *supra* note 5, at 33 (noting that protection of farm and forest land, and channeling development within urban growth boundaries, are central tenets of Oregon's land use planning system); Edward J. Sullivan, *Remarks to University of Oregon Symposium Marking the Twenty-Fifth Anniversary of S.B. 100*, 77 OR. L. REV. 813, 817-24 (1998) (describing Oregon land use planning system); Matthew A. Light, Note, *Different Ideas of the City: Origins of Metropolitan Land-Use Regimes in the United States, Germany, and Switzerland*, 24 YALE J. INT'L L. 577, 582 n.19 (1999) (noting that Oregon's comprehensive state law finds no parallel in the United States, although it resembles German and Swiss land use policies); Jason A. Robison, Note and Comment, *Shaping Oregon Climate Policy in Light of the Kyoto Protocol* 21 J. ENVTL. L. & LITIG. 207, 228 (2006)

of land development decisions that in other jurisdictions are typically made by local officials.[7] Although the ensuing land use restrictions generated opposition, Oregon voters ratified the land use planning system three times during its first ten years of existence.[8]

But the situation changed in the 1990s, when a libertarian property rights group began to challenge what it considered to be Oregon's land use overregulation. This group, Oregonians In Action, assisted Florence Dolan in her successful 1994 appeal to the U.S. Supreme Court, claiming development conditions imposed by the city of Tigard unconstitutionally took her property rights.[9] Moving to more wholesale reform, the group spearheaded the effort that put Measure 37 and its 2000 predecessor on the ballot and later defended the constitutionality of each. Although the 2007 Oregon Legislature has asked the voters whether to amend Measure 37,[10] there is no doubt that the rise of libertarian property has forever altered the landscape of property rights in the state, and that of Arizona as well, where voters approved a Measure 37-like initiative in 2006.[11]

(discussing how Oregon's land use planning program addresses climate change by, for example, preserving forests and agricultural land). *See also infra* Part I.

7. *See, e.g.*, OR. REV. STAT. § 197.646 (2005) (requiring local government to amend the state's comprehensive plan and land use regulations to implement new land use statutes and LCDC land use goals and rules); James H. Wickersham, Note, *The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes*, 18 HARV. ENVTL. L. REV. 489, 529-35 (1994) (discussing interaction between state and local government under statewide land use planning systems); *cf.* 4 ANDERSON'S AMERICAN LAW OF ZONING § 24.01 (Kenneth H. Young ed., 4th ed. 1996) ("[T]he legislation of most states continues to reflect an underlying assumption that the control of land use is basically a local problem.").

8. Citizen initiatives which would have repealed or severely curtailed statewide land use planning appeared on the 1976, 1978 and 1982 ballots. Voters rejected these measures overwhelmingly—by a margin of 57 to 43 percent in 1976, 61 to 39 percent in 1978, and 55 to 45 percent in 1982. *See* CITY CLUB OF PORTLAND, MEASURE 7 AND COMPENSATION FOR THE IMPACTS OF GOVERNMENT REGULATION 19-20 (2002), *available at* http://www.pdxcityclub.org/pdf/Measure7_2002.pdf (discussing ballot measures); Oregon Blue Book, Initiative, Referendum and Recall, http://bluebook.state.or.us/state/elections/elections19.htm (last visited Nov. 4, 2007) (giving election results for 1976 and 1978 ballot measures); Oregon Blue Book, Initiative, Referendum and Recall, http://bluebook.state.or.us/state/elections/elections20.htm (last visited Nov. 4, 2007) (giving results for 1982 ballot measure).

9. Dolan v. City of Tigard, 512 U.S. 374, 374-95 (1994). *See generally Colloquy*, Dolan v. City of Tigard: *The Takings Clause Doctrine of the Supreme Court and the Federal Circuit:* Dolan v. City of Tigard, 25 ENVTL. L. 111 (1995).

10. *See infra* Part VI.

11. Private Property Rights Protection Act, Ariz. Prop. 207 § 12-1134 (Proposition 207) (2006) (codified at ARIZ. REV. STAT. § 12-1134 (2007)). Arizona's Proposition 207 was adopted by a landslide margin of 64.8 to 35.2 percent. Ariz. Secretary of State, 2006 General Election Results, http://www.azsos.gov/results/2006/general/BM207.htm. Voters in California, Washington and Idaho rejected Measure 37-type ballot initiatives in the 2006 elections, however. California's Proposition 90 failed by a margin of 47.6 to 52.4 percent; Washington's Initiative 933 failed by a margin of 41 to 59 percent; and Idaho's Proposition 2 failed by a margin of 24 to 76 percent. *See* Cal. Secretary of State, Statement of Vote, 2006 General Election, http://www.ss.ca.gov/elections/sov/2006_general/measures.pdf (last visited Nov. 4, 2007); Wash. Secretary of State, 2006 Election Results, http://vote.wa.gov/Elections/general/Measures.aspx (last visited Nov. 4, 2007); Idaho Secretary of State, November 7, 2006 General Election Results, Statewide Totals, http://www.idsos.state.id.us/ELECT/RESULTS/2006/general/tot_stwd.htm (last visited Nov. 4, 2007).

It is worth pausing to consider why libertarian property would appeal to the voters of the early twenty-first century. One reason may be that its message is deceptively simple: to allegedly restore individual property rights, which the federal and most state constitutions protect against "takings" for public use without payment of "just compensation."[12] What is meant by property rights, however, is hardly ever explained. There seems to be a subliminal libertarian message that property rights equate to development rights, and that regulation—or at least some kinds of regulation—limiting a landowner's right to develop is impermissible without constitutionally required compensation. This version of libertarian thought was not part of the intent of the either the U.S. or Oregon constitutional framers.[13] Moreover, the Supreme Court found no regulatory takings until 1922,[14] and both that Court and the Oregon Supreme Court have largely rejected regulatory takings allegations ever since.[15] In short, libertarian property has never dominated judicial thinking, although it has a few adherents in the legal academy.[16]

Libertarian property has been out of the mainstream because it is based on several flawed assumptions. Libertarians see property in static terms, with fixed boundaries and clearly defined rights.[17] But, in fact, property rights are created and evolve over time to meet a society's felt necessities; one's development rights are less dependent on landowner

12. *See, e.g.*, U.S. CONST. amend. V; ARIZ. CONST. art. II, § 17; CAL. CONST. art. I, § 19; IDAHO CONST. art. I, § 14; OR. CONST. art. I, § 18; WASH. CONST. art. I, § 16.

13. *See generally* John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099 (2000); John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995); Derek O. Teaney, Comment, *Originalism as a Shot in the Arm for Land-Use Regulation: Regulatory "Takings" Are Not Compensable Under a Traditional Originalist View of Article I, Section 18 of the Oregon Constitution*, 40 WILLAMETTE L. REV. 529 (2004).

14. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 412-16 (1922) (concluding that a state subsidence control statute took a coal company's reserved mining rights by forbidding mining under homes and other specified places).

15. *See* Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 306-43 (2002) (development moratorium imposed during the process of devising a comprehensive land-use plan not a taking); Keystone Bituminous Coal Assoc. v. DeBenedictis, 480 U.S. 470, 473-74 (1987) (state subsidence control statute—quite similar to that in *Pennsylvania Coal* requiring a coal company to keep 50 percent of its coal in place and to repair any subsidence-caused damage not a taking, *see* case cited *supra* note 14); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 122-38 (1978) (New York's landmark preservation ordinance, which prevented the owner of Grand Central Station from constructing a development over the station not a taking); Coast Range Conifers, LLC v. State *ex rel.* Or. State Bd. of Forestry, 117 P.3d 990, 991 (Or. 2005) (prohibiting logging of nine acres of a forty-acre parcel by regulation not a taking because thirty-one acres of the parcel were unaffected); Dodd v. Hood River County, 855 P.2d 608, 610-16 (Or. 1993) (zoning law preventing siting of a dwelling on parcel ruled not a taking because some economic benefit from harvesting the parcel's timber remained).

16. *See, e.g.*, RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 349 (1985); James L. Huffman, *A Coherent Takings Theory At Last: Comments On Richard Epstein's Takings: Private Property and the Power of Eminent Domain*, 17 ENVTL. L. 158-76 (1986) (favorably reviewing book). Professor Huffman successfully argued the case defending Measure 37 before the Oregon Supreme Court.

17. *See* ERIC T. FREYFOGEL, THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD 7, 175 (2003).

boundaries than the character of the neighborhood.[18] For libertarians, property rights are individualistic bulwarks against the Leviathan state;[19] some even maintain that property rights are pre-political in nature.[20] Yet property rights are created by the state, to serve community ends, and depend upon state enforcement.[21]

Libertarians view property value as landowner created, whereas that value is usually due more to the character of the neighborhood, surrounding improvements, the health of the land itself, and tax policy.[22] For libertarians, liberty is the paramount value, but there are other competing and cherished values like conservation and ecosystem health. Libertarian property undermines conservation and ecosystems by fragmenting landscapes, increasing transboundary problems, and inhibiting protection of resources like wildlife that require landscape-scale coordination.[23] Libertarian property's equation of property with development rights also ignores the fact that development often interferes with neighbors' quiet enjoyment rights.[24]

The flawed assumptions underlying libertarian property explain why it has never been broadly accepted by the courts. Consequently, takings claimants have seldom succeeded in obtaining judicially ordered

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18. *See id.* at 16-18, 27-28 (discussing the contextual nature of property rights); *id.* at 65-99 (providing examples of how property rights evolve over time).

19. *See, e.g.*, James L. Huffman, *The Role of Courts in the Implementation and Administration of Environmental Legislation*, THE ADVOCATE, Spring 1984, at 9, 13 ("The American Leviathan state is ample evidence that democracy provides little protection from state intrusion into private decision making.").

20. *See, e.g.*, EPSTEIN, *supra* note 16, at 5, 230-31 (embracing natural rights theory, which "asserts that the end of the state is to protect liberty and property, as these conceptions are understood independent of and prior to the formation of the state;" asserting that the proposition which the eminent domain clause asserts is that "there is some natural and unique set of entitlements that are protected under a system of private property").

21. *See* FREYFOGEL, *supra* note 17, at 208-09 ("Property draws its philosophic justification from the common good . . . . Landowner liberty, accordingly, should be recognized in property law only when it helps promote the common good . . . . [P]roperty law is a creation of the majority . . . and should respond to its needs."); Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1668-71 (1988) (criticizing natural rights view of property).

22. *See* FREYFOGEL, *supra* note 17, at 129 ("The value of land today results not just from labors expended on it. Value also comes from what other people have done to surrounding lands; from neighborhoods, communities, and vast cities that have arisen over time. Value comes to a parcel from its proximity to those surrounding improvements, as well as from local scarcities of land generally. Value also comes from nature itself . . . ."). A 2007 study done by the Georgetown Environmental Law & Policy Institute found no systematic negative effective of Oregon's land use regulation on the land value of restricted parcels within urban growth boundaries or agricultural lands. GEORGETOWN ENVTL. LAW & POLICY INST., PROPERTY VALUES AND OREGON'S MEASURE 37: EXPOSING THE FALSE PREMISE OF REGULATION'S HARM TO LANDOWNERS 2 (2007), *available at* http://www.law.georgetown.edu/gelpi/GELPIMeasure37Report.pdf (finding no significant difference between land values in Oregon and in neighboring states and noting that "as much as 14% of current agricultural land values in Oregon represents the capitalized value of the state policy of taxing agricultural subsidies at a much lower effective rate than other lands," and that federal agricultural subsidies have also positively affected Oregon agricultural land value).

23. *See* FREYFOGEL, *supra* note 17, at 177-78 (discussing the "tragedy of fragmentation").

24. *See id.* at 56, 218-19 (discussing property's positive component of protecting landowners' liberty to enjoy healthy landscapes).

compensation due to alleged overregulation.[25] Disappointment with the both the federal and state courts' interpretation of takings cases encouraged Oregonians In Action to shift the focus of its attention from the courts to the initiative process. The group's ensuing success not only means dramatic changes in the nature of property rights in Oregon, but elsewhere in states like Arizona that are following the Oregon example.[26]

This article examines the forces that led to Oregon's Measure 37, analyzes its text, explains its implementation, and considers its underlying libertarian philosophy. Section I begins by describing the history and structure of Oregon's comprehensive land use planning system and pre-Measure 37 citizen initiative challenges to the system. Section II recounts the background of Oregon voters' adoption of Measure 37 as well as its survival in the constitutional challenge that followed. Section III discusses the scope of the measure and early administrative and judicial interpretations of its muddled language. Section IV examines the measure's exceptions and explains how they may affect its scope. Section V surveys the exportation of Measure 37 to other states. Section VI discusses the current state of Measure 37 claims in Oregon and the recent referendum Oregon voters approved as Measure 49, in an effort to minimize those effects. The article concludes that the abstractions and absolutism central to libertarian property make it unsuited to become the dominant property philosophy in the twenty-first century, where context and connection are increasingly paramount considerations in a carbon-limited world that is becoming more obviously interconnected all the time. Viewed in this light, Measure 37 is an unfortunate experiment that ought not to enjoy widespread replication and about which the Oregon electorate has already expressed second thoughts.

I. BACKGROUND: THE OREGON LAND USE PROGRAM

Oregon's comprehensive statewide land use planning system, designed to foster citizen involvement,[27] manage population growth,[28] pre-

25. One exception is Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1071-73 (1992), which equated complete economic wipeouts due to regulations with permanent governmental physical occupations. But there are few such wipeouts, and the *Lucas* Court's exemption for regulations that merely replicate "background principles" of property or nuisance law, has provided government defendants with a significant new defense in takings cases, effectively swallowing the Lucas wipeout rule. *See* Michael C. Blumm & Lucus Ritchie, Lucas*'s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321 (2005).

26. *See* Private Property Rights Protection Act, Ariz. Prop. 207 § 12-1134 (Proposition 207) (2006) (codified at ARIZ. REV. STAT. § 12-1134 (2007)); Ariz. Secretary of State, 2006 General Election Results, http://www.azsos.gov/results/2006/general/BM207.htm.

27. The tenets of Oregon's land use planning system are contained in statewide land use planning goals, the first of which requires public bodies "to develop a citizen involvement program that insures the opportunity for citizens to be involved in all phases of the planning process." Goal 1, Statewide Planning Goals, Oregon Department of Land Conservation and Development, http://www.oregon.gov/LCD/docs/goals/goal1.pdf (last visited Nov. 4, 2007); *see infra* note 53 (describing where statewide goals are published).

28. Statewide planning goal 14 requires local governments to establish urban growth boundaries to avoid sprawl, provide for orderly development, and encourage the efficient use of land. Goal

serve agricultural and forest resources,[29] and promote economic growth,[30] is well known. Since its inception in 1973, the system has engendered both strong praise and strong criticism.[31] Measure 37 is best understood in the context of this tumultuous history. This section describes the history and structure of Oregon's statewide land use planning system and several pre-Measure 37 citizen initiative attempts to repeal the system.

A. The Structure of Oregon's Land Use Planning System

In the late 1960s and early 1970s, reacting both to concerns about the effects of unregulated growth in Oregon[32] and an emerging national interest in land use planning,[33] the Oregon legislature enacted a number of land use and preservation statutes,[34] culminating in Senate Bill (S.B.)

14, Statewide Planning Goals, Oregon Department of Land Conservation and Development, http://www.oregon.gov/LCD/docs/goals/goal14.pdf (last visited Nov. 4, 2007). Goal 14 is discussed in greater detail *infra* at notes 64-68 and accompanying text.

29. Statewide planning goals 3 and 4 require the preservation of agricultural and forest land, respectively. Goals 3 and 4, Statewide Planning Goals, Oregon Department of Land Conservation and Development, http://www.oregon.gov/LCD/docs/goals/goal3.pdf (last visited Nov. 4, 2007), http://www.oregon.gov/LCD/docs/goals/goal4.pdf (last visited Nov. 4, 2007). The preservation of agricultural and forest land is discussed in detail *infra* at notes 69-91 and accompanying text.

30. Statewide planning goal 9 requires land use plans to "to provide adequate opportunities throughout the state for a variety of economic activities vital to the health, welfare, and prosperity of Oregon's citizens." Goal 9, Statewide Planning Goals, Oregon Department of Land Conservation and Development, http://www.oregon.gov/LCD/docs/goals/goal9.pdf (last visisted Nov. 4, 2007). A persistent criticism levied against Oregon's land use planning system is that it stifles economic development through its emphasis on resource preservation. *See, e.g.*, Steven Geoffrey Gieseler, Leslie Marshall Lewallen & Timothy Sandefur, *Measure 37: Paying People For What We Take*, 36 ENVTL. L. 79, 93 (2006) (arguing that Oregon's land use planning system stifles economic growth); James L. Huffman & Elizabeth Howard, *The Impact of Land Use Regulations On Small and Emerging Businesses*, 5 J. SMALL & EMERGING BUS. L. 49 (2001) (discussing Oregon land use program's effect on small business development). *But see* Henry R. Richmond, *Does Oregon's Land Use Program Provide Enough Desirable Land to Attract Needed Industry to Oregon?*, 14 ENVTL. L. 693, 694 (1984) (arguing that land use program accommodates development).

31. *See, e.g.*, LEONARD, *supra* note 5, at 64-66 (discussing early opposition to passage of S.B. 100 and Goal 3); Gordon Oliver & R. Gregory Nokes, *Land-Use Law Showing Its Age*, OREGONIAN, May 31, 1998, at B01 (discussing tumultuous history of Oregon land use law). *See generally* Conference, *Federal Land Use Planning Conference* (March 20-22, 1975), 5 ENVTL. L. 369, 369-761 (1975) (discussing state and proposed national comprehensive land use planning statutes and presenting a spectrum of contemporary views on the topic).

32. Growth was a pressing issue in Oregon in the late 1960s and 1970s. Rapid, and sometimes feckless, development in three areas of the state—the Willamette Valley, the coast near Lincoln City, and eastern Oregon rangeland—garnered much political and media attention. CHARLES E. LITTLE, THE NEW OREGON TRAIL: AN ACCOUNT OF THE DEVELOPMENT AND PASSAGE OF STATE LAND-USE LEGISLATION IN OREGON 18-20 (1974); LEONARD, *supra* note 5, at 4-7, 64. A study commissioned by Governor Tom McCall predicted that, without government intervention, urban land in the Willamette Valley would increase by 75 percent or 340,000 acres between 1972 and 2020. KNAPP & NELSON, *supra* note 5, at 18-19. For a list of land use related legislation passed by the 1973 legislature see Sarah Elizabeth Fussner & William S. Wiley, Comment, *Oregon's State Land Use Planning Act – Two Views*, 54 OR. L. REV. 203, 203-04 n.4 (1975).

33. *See, e.g.*, Land Use Policy and Planning Assistance Act, S. 632, 92d Cong. (1972); S. 268, 93d Cong. (1973); Sullivan, *supra* note 6, at 815 (discussing the national interest in land use planning in the early 1970s).

34. These statutes included S.B. 10, 1969 Leg. Assem. (Or. 1969); 1969 Or. Laws 324 (Or. 1969). S.B. 10 was a precursor to Oregon's comprehensive, statewide land use bill. It encouraged comprehensive land use planning by requiring the Governor to impose a comprehensive land use

100, which passed in 1973.[35] S.B. 100 became the foundation for Oregon's present statewide comprehensive land use planning regime.

S.B. 100 created a new state agency, the Department of Land Conservation and Development ("DLCD"), directed by a Land Conservation and Development Commission ("LCDC").[36] The statute empowered LCDC to create a statewide land use policy and required local governments[37] to adopt their own comprehensive land use plans that would im-

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plan upon local governments which failed to adopt their own. S.B. 10, 1969 Leg. Assem., § 1 (Or. 1969). The bill required land use plans to incorporate nine goals, including conserving farm land for the production of crops, preserving open space, air, and water quality, and diversifying the economy of the state. S.B. 10, 1969 Leg. Assem., § 3 (Or. 1969). S.B. 10 ultimately failed to achieve its goals, however, due to a lack of standards for evaluating the local governments' comprehensive plans, a lack of effective enforcement mechanisms to ensure that the plans complied with S.B. 10's goals, a lack of coordination of plans between contiguous local governments, and a lack of state funding to local governments to implement the statute. *See* KNAPP & NELSON, *supra* note 5, at 20-21; LEONARD, *supra* note 5, at 6-7; LITTLE, *supra* note 32, at 10; Sullivan, *supra* note 6, at 814.

35. 1973 Or. Laws 80 (codified as amended at OR. REV. STAT. § 197 (2005)). The legislature's concern about the effects of uncoordinated land use was codified in findings and a policy statement in the statute itself. *Id.* § 197.010; *see also* 1000 Friends of Oregon v. Land Conservation & Dev. Comm'n, 642 P.2d 1158, 1164-65 (Or. 1982) (discussing S.B. 100's legislative history).

36. LCDC is comprised of seven members appointed by the governor, confirmed by the state Senate, and serving staggered four-year terms. Its members are drawn from geographically diverse regions of the state. 1973 Or. Laws 80, § 5 (codified as amended at OR. REV. STAT. § 197.030 (2005)).

Bill 100 also created a Joint Legislative Committee on Land Use, tasked with overseeing DLCD, keeping the legislature informed of the development of land use goals and guidelines, and making legislative recommendations. 1973 Or. Laws 80, §§ 22-24 (codified as amended at OR. REV. STAT. § 197.125-.135 (2005)). The bill directed the Joint Committee to make recommendations on the "implementation of a program for the compensation by the public to owners of lands . . . for the value of any loss of use of such lands resulting directly from the imposition of any zoning, subdivision or other ordinance or regulation regulating or restricting the use of such lands." 1973 Or. Laws 80, § 24(4). In 1981, this requirement was deleted from the statute. 1981 Or. Laws 748, § 24 (codified at OR. REV. STAT. § 197.135 (2005)); *see* CITY CLUB OF PORTLAND, *supra* note 8, at 18 (discussing the Joint Committee's efforts); Rebekah R. Cook, *Sustainable Land Use and Measure 37, Incomprehensible, Uncompensable, Unconstitutional: The Fatal Flaws of Measure 37*, 20 J. ENVTL. L. & LITIG. 245, 248-49 (2005) (discussing S.B 849, a failed proposal by the 1973 legislature to compensate property owners whose use of their property was curtailed by government regulation); David J. Hunnicutt, *Oregon Land-Use Regulation and Ballot Measure 37: Newton's Third Law at Work*, 36 ENVTL. L. 25, 28 (2006) (discussing the Joint Committee's efforts).

37. "Local governments" are cities, counties, state agencies, special districts or other governing bodies that make land use decisions. 1973 Or. Laws 80, § 3 (codified as amended at OR. REV. STAT. § 197.015(14) (2005)).

plement the statewide policy.[38] LCDC established the state's land use policy in the form of 19 "goals."[39]

Local governments had to adopt comprehensive land use plans consistent with the statewide goals within one year of LCDC's promulgation of the goals.[40] LCDC monitored local governments' comprehensive plans. Initially, local governments were to submit their local plans to the LCDC, which could amend any comprehensive plan not in conformance with the goals, impose its own plan at the local government's expense, or enjoin construction not in conformance with an amended or imposed comprehensive plan.[41] LCDC also had authority to hear petitions by individuals and county governments challenging local land use decisions as inconsistent with the goals, and the agency could issue administrative orders enjoining local government land use decisions which it determined violated the goals.[42]

In 1977, the legislature established an "acknowledgment" process, under which a local government could petition LCDC to review its land use plan and certify the plan's consistency with the statewide goals.[43] Once LCDC acknowledged a local plan, a local government could measure most of its land use decisions against the plan rather than the state-

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38. Bill 100 defined comprehensive plan as:

> [A] generalized, coordinated land use map and policy statement . . . that interrelates all functional and natural system and activities relating to the use of lands, including but not limited to sewer and water systems, transportation systems, educational systems, recreational facilities, and natural resources and air and water quality management programs. "Comprehensive" means all-inclusive, both in terms of the geographic area covered and functional and natural activities and systems occurring in the area covered by the plan. "General nature" means a summary of policies and proposals in broad categories and does not necessarily indicate specific locations of any area, activity or use. A plan is "coordinated" when the needs of all levels of governments, semipublic and private agencies and the citizens of Oregon have been considered and accommodated as much as possible. "Land" includes water, both surface and subsurface, and the air.

1973 Or. Laws 80, § 2 (codified at OR. REV. STAT. § 197.015(6) (2005)).

39. 1973 Or. Laws 80, § 11 (codified as amended at OR. REV. STAT. § 197.040 (2005)). The bill required LCDC and DLCD to hold public hearings and appoint a state Citizen Involvement Advisory Committee to insure public participation in the formulation of its land use planning goals. *Id.* §§ 35, 36 (codified as amended at OR. REV. STAT. § 197.235 (2005)). The bill also directed LCDC to "give priority consideration" to eleven areas and activities, mostly focused on preservation of resources like lakes, rivers, estuarine resources, wetlands, floodplains, unique wilderness habitats, coastal headlands and beaches and agricultural land. The 19 goals LCDC promulgated are discussed below. *See infra* notes 53-91 and accompanying text.

40. 1973 Or. Laws 80, §§ 18, 32 (codified as amended at OR. REV. STAT. § 197.250 (2005)). The bill required local plans already in existence to comply with the goals set forth in S.B. 10. *Id.* § 41. As discussed below, local governments took considerably longer than one year to enact their comprehensive land use plans. *See infra* note 44.

41. 1973 Or. Laws 80, §§ 44, 47.

42. 1973 Or. Laws 80, §§ 44, 47, 50-53. The goals provided an independent basis to challenge local governments' land use decisions, giving county governing bodies standing to petition LCDC to challenge local land use plan provisions, ordinances or particular actions. It also authorized individuals with affected interests to petition LCDC to challenge land use plan provisions and ordinances, but not particular land use actions. 1973 Or. Laws 80, § 51. This avenue of review was repealed in 1979 when the legislature enacted the Land Use Board of Appeals, described further *infra* at note 48. *See generally* Sullivan, *supra* note 6, at 817.

43. 1977 Or. Laws 766, § 18 (codified as amended at OR. REV. STAT. § 197.251 (2005)).

wide goals.[44] To ensure acknowledged plans remained consistent with the statewide goals, the legislature required local governments to submit proposed plan amendments to DLCD and required DLCD to disseminate the proposals to interested parties and advise local governments of concerns about the amendments.[45] The legislature also required local governments to conduct periodic reviews of their comprehensive plans to ensure that they remained consistent with the goals.[46] In addition, the statute required LCDC to approve localities' periodic plan review and any amendments needed to bring local plans into compliance with the goals.[47] To encourage consistent adjudication of disputed land use decisions, the legislature in 1979 created a Land Use Board of Appeals ("LUBA"), a three-member panel appointed by the governor, with jurisdiction to hear virtually all appeals of local land use decisions.[48]

Although nearly every ensuing legislative session has amended the land use planning statute, the basic structure of the system established by

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44. *See* 1000 Friends of Oregon v. Land Conservation & Dev. Comm'n, 724 P.2d 268, 274-75 (Or. 1986) (describing the process and effect of acknowledgment); KNAPP & NELSON, *supra* note 5, at 34. Prior to state acknowledgment, local governments had to review each local land use action (such as a zoning change) for compliance with the goals and that interpretation was subject to challenge. *See, e.g.*, South of Sunnyside Neighborhood League v. Bd. of Comm'rs of Clackamas County, 569 P.2d 1063, 1073 (Or. 1977).

Despite S.B. 100's initial requirement that local governments adopt compliant comprehensive plans within one year of LCDC's promulgation of the statewide goals, the last local comprehensive plan did not receive state acknowledgment until August 7, 1986, some 11 years after goal promulgation. OREGON LAND CONSERVATION AND DEV. COMM'N, 1985-87 BIENNIAL REPORT TO THE LEGISLATIVE ASSEMBLY OF THE STATE OF OREGON 1 (1987). In all, by 1986, LCDC acknowledged some 277 local comprehensive plans: 241 city plans and 36 county plans. *Id.*; *see also* LEONARD, *supra* note 5, at 34 (describing the reasons for delay in plan acknowledgment, which included the complexity of developing local comprehensive plans, and some local governments' "wait and see" attitude toward implementing comprehensive plans); 1000 Friends of Oregon v. Land Conservation & Dev. Comm'n, 724 P.2d 268, 274 n.5 (Or. 1986) (noting acknowledgment of last plan, but also the continued litigation about acknowledgment of various other local plans).

45. 1981 Or. Laws 748 (codified as amended at OR. REV. STAT. § 197.610-197.625 (2005)). Unlike LCDC's adjudicative role in periodically reviewing comprehensive plans, DLCD assumes only an advisory role when reviewing amendments to plans between review periods. The statute authorizes DLCD to comment on, but not approve or reject, proposed plan changes. To challenge amendments, DLCD must appeal the amendment to the Land Use Board of Appeals, discussed *infra* at note 48. *See* Volny v. City of Bend, 523 P.3d 768, 773 (Or. Ct. App. 2000) (characterizing DLCD's role as "that of a party in the local government proceedings").

46. 1991 Or. Laws 612 (codified as amended at OR. REV. STAT. § 197.628 - 197.646 (2005)).

47. *Id*; *see* City of West Linn v. Land Conservation and Dev. Comm'n, 119 P.3d 283, 287-88 (Or. App. 2005) (describing periodic review process in the context of Portland's urban growth boundary).

48. 1979 Or. Laws 772 (codified as amended at OR. REV. STAT. § 197.805-197.810 (2005)). Before the creation of LUBA, parties could seek review of local land use decisions, such as zoning changes, by petitioning for a writ of review or initiating a declaratory judgment action in a circuit court, or by petitioning the LCDC to review the decision and issue an administrative order. 1973 Or. Laws 80, § 51. Now, LUBA has "exclusive jurisdiction to review any land use decision or limited land use decision," a broad grant of jurisdiction which encompasses land use decisions ranging from plan amendments to individual zoning approvals. OR. REV. STAT. § 197.825 (2005). LCDC retains jurisdiction over acknowledgment, periodic review, and approval of exceptions to comprehensive plans. § 825(c). The Court of Appeals hears appeals of LCDC orders and LUBA decisions. OR. REV. STAT. §§ 197.650, 197.850(3)(a) (2005). *See generally,* Edward J. Sullivan, *Reviewing the Reviewer: The Impact of the Land Use Board of Appeals on the Oregon Land Use Program, 1979-1999*, 36 WILLAMETTE L. REV. 441, 446-49 (2000) (describing the origins of LUBA).

S.B. 100 has endured. Over thirty years later, local governments continue to promulgate comprehensive plans and make day-to-day land use decisions. The state continues to oversee local government land use decisions by (1) certifying local plans' consistency with the goals;[49] (2) conducting ongoing review of plans;[50] (3) advising local governments on and challenging plan amendments;[51] and (4) hearing appeals of most types of disputed local land use actions.[52]

B. Statewide Land Use Goals

A fundamental goal of the Oregon system is the infusion of statewide goals into local decisionmaking.[53] After a series of statewide public hearings,[54] LCDC initially approved fourteen goals in 1974. Over the next two years, the agency adopted five additional goals.[55]

The goals are in four broad categories: two address the planning process;[56] seven address conservation;[57] six address development;[58] and four address coastal resources.[59] Although the goals have been periodically amended,[60] no new goals have been added or deleted since the adoption of Goal 19 in late 1976. LCDC promulgates "guidelines" for each rule, suggesting how local governments may carry out the goals, but the guidelines are not themselves binding.[61]

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49. OR. REV. STAT. § 197.251 (2005).

50. OR. REV. STAT. § 197.629 (2005).

51. OR. REV. STAT. § 197.615 (2005).

52. § 197.825.

53. OR. REV. STAT. § 197.015(9) (2005). Statewide goals are rules under the state's Administrative Procedure Act. Although the Oregon Administrative Rules contain a list of the goals, the full text of each goal is available only from the LCDC in paper format or at its website. *See* Statewide Planning Goals, Oregon Dep't of Land Conservation & Dev., *available at* http://www.oregon.gov/LCD/goals.html [hereinafter *Goals*]; *see also* 1000 Friends of Oregon v. Land Conservation and Dev. Comm'n, 724 P.2d 268, 274 n.4 (Or. 1986) (noting that full text of the goals and guidelines are not in the Oregon Administrative Rules and appear to be available only from LCDC).

54. The goals addressed: (1) citizen involvement; (2) land use planning processes; (3) agricultural lands; (4) forest lands; (5) open spaces, scenic and historic areas and natural resources; (6) air, water and land resources quality; (7) natural hazards and disasters; (8) recreation; (9) economic development; (10) housing; (11) public facilities and services; (12) transportation; (13) energy conservation; and (14) containment of urban growth. OR. ADMIN. R. 660-015-000 (2006).

55. These five goals addressed: (15) the Willamette River greenway; (16) estuarine resources; (17) coastal shorelands; (18) beaches and dunes; and (19) ocean resources. *Id.*

56. Goals 1 and 2, *Goals*, *supra* note 53.

57. Goals 3-7, 13, 15, *Goals*, *supra* note 53.

58. Goals 8-12, 14, *Goals*, *supra* note 53.

59. Goals 16-19, *Goals*, *supra* note 53.

60. Each time LCDC amends a goal, local governments must bring their plans into compliance with the new goal within one year of its effective date. OR. REV. STAT. § 197.245 (2005).

61. Goal 2, which defines "guidelines," provides that "[a]bove all, guidelines are not intended to be a grant of power to the state to carry out zoning from the state level under the guise of guidelines." Goal 2, *Goals*, *supra* note 53. LCDC also promulgates administrative rules pursuant to the state's Administrative Procedure Act to implement the goals. OR. REV. STAT. § 197.040(1)(b) (2005).

The preservation of agricultural land and natural resources through the containment of growth in urban areas under Goal 14 and the restriction of land uses outside those areas, particularly through Goals 3 and 4, lie at the heart of Oregon's land use system.[62] They also serve as the focus of critics' objections to the system.[63]

1. Urban Growth Boundaries

Goal 14 requires each local government "to provide for an orderly and efficient transition from rural to urban land use" by establishing urban growth boundaries.[64] An urban growth boundary defines the limits of forseeable urban development.[65] Land inside the boundary may be developed for urban use;[66] land outside the boundary must remain rural.[67]

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62. LEONARD, *supra* note 5, at 33 (noting that protection of farm and forest land, drawing urban growth boundaries and facilitating development within the urban growth boundaries was at the heart of the land use planning system).

63. *See* Hunnicutt, *supra* note 36, at 28 (criticizing the comprehensive land use planning and characterizing the system put in place by S.B. 100 as undemocratic because it "stripped local communities of final authority over planning and zoning decisions in their jurisdiction, and transferred that authority to an unelected commission of political appointees of the Oregon governor"). *See* discussion *infra* notes 92-135 and accompanying text.

64. Goal 14, *Goals*, *supra* note 53. LCDC substantively amended Goal 14 in 1988, 2000, and twice in 2005. *See* Or. Dep't of Land Conservation and Dev., History of Statutes, Goals & Rules, http://www.oregon.gov/LCD/history_statutes_goals_rules.shtml (last visited Nov. 4, 2007). The 1988 amendment simply included reference to the fact that local governments could now refer to their acknowledged comprehensive plans, rather than to the goals, when making land use decisions. *Id.* The 2000 amendment allowed LCDC to promulgate rules, which it did, providing that Goal 14 does not prevent the sitting of single family dwellings on certain land outside of urban growth boundaries zoned primarily for residential use and in an area for which an exception to Goals 3 and 4 has been acknowledged. *Id.*; OR. ADMIN. R. 660-004-0040 (2007). The December 2005 amendment brought the goal in line with legislation allowing certain industrial developments to be sited on rural land, notwithstanding Goal 14. *Id.* The April 2005 amendments substantially reorganized the goal to streamline and clarify the requirements for local governments to amend their urban growth boundaries. *See* New Goal 14, 2005-2007 Rulemaking, Or. Land Conservation and Dev. Comm'n, *available at* http://www.oregon.gov/LCD/rulemaking_2005-07.shtml (last visited Nov. 4, 2007).

Goal 14 outlines six criteria that local governments must take into account in establishing, amending, and determining their urban growth boundaries. Local governments must base their urban growth boundary on two demonstrated needs, the need "to accommodate long range urban growth, consistent with a 20-year population forecast" and the need "for housing, employment opportunities, livability or uses such as public facilities, streets and roads, schools, parks or open space." Goal 14, *Goals*, *supra* note 53. Local governments must base the location of the boundary on a consideration of: (i) "[e]fficient accommodation of identified land needs"; (ii) "[o]rderly and economic provision of public facilities and services"; (iii) "[c]omparative environmental energy, economic and social consequences"; and (iv) "[c]ompatibility of the proposed urban uses with nearby agricultural and forest activities occurring on farm and forest land outside the [urban growth boundary]." *Id.*

65. Urban growth boundaries must encompass sufficient land to meet the projected residential, industrial, commercial, and recreational needs of the community for the next 20 years. Goal 14, *Goals*, *supra* note 53.

66. Goal 14 establishes four factors that local governments must consider when developing land within their urban growth boundary: (i) orderly, economic provision for public facilities and services; (ii) availability of sufficient land for the various uses to insure choices in the market place; (iii) LCDC goals or the acknowledged comprehensive plan; and (iv) encouragement of development within urban areas before conversion of urbanizable areas. Goal 14, *Goals*, *supra* note 53.

67. *See* KNAPP & NELSON, *supra* note 5, at 39-42; Wickersham, *supra* note 7, at 529-32. For a description of the history of urban growth boundaries in Oregon, see LEONARD, *supra* note 5, at 91-124.

Under Goals 3 and 4, local governments classify the great majority of the land outside urban growth boundaries as agricultural or forest land.[68]

2. Agricultural Land

Goal 3 stipulates that "agricultural lands shall be preserved and maintained for farm use."[69] The goal defines agricultural land broadly, including all land outside of urban growth boundaries exhibiting certain soil characteristics,[70] all "other land" suitable for farming,[71] and land not suitable for agriculture but "necessary to permit farm practices to be undertaken on adjacent or nearby lands."[72] As originally promulgated in 1974, Goal 3 recognized only a single class of agricultural land, requiring local governments to regulate all agricultural land through exclusive farm use zoning.[73]

Proponents of urban growth boundaries contend that geographically limiting development not only protects surrounding agricultural and farm land, but also saves significant infrastructure costs. *See, e.g.* 1000 Friends of Oregon, Questions and Answers About Oregon's Land Use Program, Section B: Urban Planning (2006), http://gw.friends.org/resources/qanda2.html (last visited Nov. 9, 2007). Opponents of urban growth boundaries argue that the boundaries raise the price of housing, encourage overly dense housing patterns, increase traffic congestion, and prevent investment in road and infrastructure expansion. *See, e.g.*, LEONARD, *supra* note 5, at 105; Oregonians In Action, Land Use/Property Rights Concerns of the Oregonians In Action Organizations, http://oia.org/overview.htm (last visited Nov. 4, 2007).

68. As of 1995, local governments had classified approximately 96 percent of privately owned land outside urban growth boundaries as either agricultural or forest land. Hunnicutt, *supra* note 36, at 33. The 2002 U.S. Department of Agriculture Census of Agriculture for Oregon reported that over 17 million acres were devoted to farming, of which 54 percent were operated by full-time farmers. U.S. DEP'T OF AGRIC., OREGON STATE AND COUNTY DATA, GEOGRAPHIC AREA SERIES, VOL. 1, PT. 37 6 (June 2004).

69. Goal 3, *Goals*, *supra* note 53.

70. *Id.* Goal 3 defines agricultural by reference to the widely used Soil Capability Classification System of the United States Soil Conservation Service. In western Oregon, land of predominantly Class I, II, III, and IV soils is agricultural land. In eastern Oregon, agricultural land also includes land of predominantly Class V and VI. *Id.*

71. *Id.* Goal 3 defines these "other lands" as "lands which are suitable for farm use taking into consideration soil fertility, suitability for grazing, climactic conditions, existing and future availability of water for farm irrigation purposes, existing land use patterns, technological and energy inputs required, or accepted farming practices." *Id.*

72. *Id.* Goal 3 defines these lands as "lands in other classes which are necessary to permit farm practices to be undertaken on adjacent or nearby lands." *Id.* In addition to the inclusion of adjacent and other lands as agricultural land, property rights advocates bemoan Goal 3's strict geology-based definition of agricultural land, arguing that it does not adequately take into account the economic viability of farming the land and prohibits alternate uses of nonproductive or marginal farm lands. *See, e.g.*, Hunnicutt, *supra* note 36, at 33; Oregonians In Action, *supra* note 67.

73. Prior farm land preservation legislation sought to protect farmland through tax incentives and by permitting, but not requiring, local governments to create exclusive farm use zones. *See* Caroline E.K. MacLaren, *Oregon at a Crossroads: Where Do We Go from Here?*, 36 ENVTL. L. 53, 59 n.29 (2006) (discussing 1963 Or. Laws 577, which authorized counties to assess a special farm use tax on farmers who used their land exclusively for farming). Goal 3 integrated prior farmland preservation legislation into the statewide comprehensive land use system by requiring exclusive farm use zoning of land classified as agricultural. LEONARD, *supra* note 5, at 66-67; Edward J. Sullivan, *The Greening of the Taxpayer: The Relationship of Farm Zone Taxation in Oregon to Land Use*, 9 WILLAMETTE L. REV. 1, 3 (1973) (critiquing farmland protection prior to comprehensive land use planning).

S.B. 101, passed in conjunction with S.B. 100 during the 1973 state legislative session, reaffirmed and amended the use of exclusive farm use zoning as a means of preserving agricultural land,

By requiring all agricultural land to be zoned for exclusive farm use, Goal 3 severely restricted the siting of dwellings on agricultural land and development of the land for any purpose other than farming.[74] Almost from its inception, the agricultural land use system generated controversy, drawing criticism for allegedly designating too much land as agricultural land,[75] for failing to recognize regional differences in land use, for impeding economic development, and for preventing individual landowners from realizing the full value of their property.[76] In response, LCDC and the legislature amended the agricultural land use system several times.[77] The number of allowable non-farm uses on agricultural land

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announcing a policy that "exclusive farm use zoning . . . substantially limits alternatives to the use of rural land and, with the importance of rural lands to the public, justifies incentives and privileges offered to encourage owners of rural lands to hold such lands in exclusive farm use zones." 1973 Or. Laws 503, § 1 (codified at OR. REV. STAT. § 215.243 (2006)); LEONARD, *supra* note 5, at 67 (noting that S.B. 101 "unequivocal" expression of the legislature's commitment to preserve farm land). Goal 3 implemented the policy articulated in S.B. 101 by making exclusive farm use zoning mandatory. For a description of the interaction between the comprehensive land use statute, OR. REV. STAT. § 197, and the farm land preservation provisions of the county planning and zoning statute, OR. REV. STAT. § 215, see *Lane County v. Land Conserv. and Dev. Comm'n*, 942 P.2d 278, 286 (Or. 1997).

74. Goal 3 originally allowed agricultural land to be used for farm uses and a limited number of non-farm uses defined in the exclusive farm zoning statute (e.g. schools, churches, golf courses, commercial power generating facilities, utility facilities, forestry). OR. REV. STAT. § 215.203, 215.213. Originally, only five non-farm uses (schools, churches, public parks, golf courses and utility facilities) were allowed in exclusive farm use zones; however, the legislature has steadily expanded the number of non-farm uses allowed on land in exclusive farm use zones. *See* Oregon Department of Land Conservation and Development, DLCD Farmland Protection Program, www.oregon.gov./LCD/farmprotprog.shtml (last visited Nov. 4, 2007) [hereinafter Farmland Protection Program] (listing chronology of legislation expanding non-farm uses allowed in exclusive farm use zones). To use land for anything other than the uses permitted by the statute, local governments had to go though the exceptions process created by Goal 2, which limited the situations in which an exception would be granted (e.g., land already "physically developed to an extent that it is no longer available for uses allowed by the applicable goal" qualified for an exception) and required local governments to justify the necessity of the alternative use. Goal 2, *Goals*, *supra* note 53. Many comprehensive plans failed LCDC acknowledgment because they contained improper exceptions to Goal 3. *See* LEONARD, *supra* note 5, at 70 (stating that improper exceptions to Goal 3 were frequently the grounds upon which LCDC denied acknowledgment).

75. In 1998, some 16 million acres, about 25 percent of the state's land, was zoned for exclusive farm use. Robin Franzen & Brent Hunsberger, *Finding Cures for Growing Pains*, OREGONIAN, Dec. 17, 1998, at C01. A 2002 estimate by the U.S. Department of Agriculture put the number of acres at 17 million. *See* U.S. DEP'T OF AGRIC., *supra* note 68 at 6.

76. LEONARD, *supra* note 5, at 64-66 (discussing early opposition to passage of S.B. 100 and Goal 3); Gordon Oliver & R. Gregory Nokes, *Land-Use Law Showing Its Age*, OREGONIAN, May 31, 1998, at B01 (discussing tumultuous history of Oregon land use law); Robin Franzen, *Farmland Laws Sowing A Bitter Debate Around Oregon: A Crop of Controversy*, OREGONIAN, Oct. 19, 1998, at A1 (discussing various sides of the debate over the agricultural land system); Robin Franzen & Brent Hunsberger, *Finding Cures for Growing Pains*, OREGONIAN, Dec. 17, 1998, at C01 (discussing various proposals for amending the state land use system to better take into account regional differences and to channel development away from the fertile Willamette valley by easing restrictions on less productive farmland, primarily in eastern part of the state). Others have argued that, because agriculture is one of the top industries in Oregon, preserving agricultural land is vital to the state's economy. *See, e.g.*, Tim Bernasek, *Oregon Agriculture and Land-Use Planning*, 36 ENVTL. L. 165, 166 (2006).

77. LCDC first amended Goal 3 in 1983 to conform with legislation passed that year that instituted a marginal land classification program, whereby local governments were allowed to designate certain lands located in exclusive farm use zones as marginal land and relax the zoning criteria for those lands. *See Lane County*, 942 P.2d at 281 n.3; 1983 Or. Laws 826, § 2.

has steadily increased,[78] as the legislature and LCDC have developed sub-categories of agricultural land to permit more varied uses of less productive farmland, while restricting uses on the most productive lands.[79] Despite these added nuances, Goal 3 and the exclusive farm use zone statute continued to generate controversy.[80]

LCDC next amended Goal 3 in 1992 to establish new agricultural land subcategories, including a category of "high-value farmland," for which LCDC established use standards more strict than those under the exclusive farm use zoning statute. History of Statutes, Goals & Rules, Department of Land Conservation and Development, http://www.oregon.gov/LCD/history_statutes_goals_rules.shtml (last visited Nov. 4, 2007). These amendments were prompted by a LCDC-commissioned study which concluded that exclusive farm use zoning was failing to adequately protect commercial farmland. DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, ANALYSIS AND RECOMMENDATIONS OF THE RESULTS AND CONCLUSIONS OF THE FARM AND FOREST RESEARCH PROJECT 1 (1991). The study showed that 75 percent of farms on which new dwellings had been approved had annual farm revenues under $10,000, suggesting that they were not being used for commercial farming. *Id.*; *see also* RICHARD BRENNER, FARMLANDS IN 12 OREGON COUNTIES: A STUDY OF COUNTY APPLICATION OF STATE STANDARDS TO PROTECT OREGON FARMLAND (1980) (finding widespread local government approval of land division proposals in violation of Goal 3 and concluding that the land use planning system was not adequately protecting farmland).

In 1993, the legislature entered the fray and enacted House Bill 3661, legislation that replaced LCDC's previous attempts to balance agriculture and development. 1993 Or. Laws 792. The bill expressly rejected and overturned the LCDC amendments to Goal 3. 1993 Or. Laws 792, § 28 (certified as amended at Or. Rev. Stat. § 215.304 (2006)) (providing that any rules inconsistent with the House Bill 3661 to have no legal effect). It sought to balance the protection of the most productive farm- and forest land with the development of less productive land by "providing certain owners of less productive land an opportunity to build a dwelling on their land . . . and limiting the future division of and the siting of dwellings upon the state's more productive resource land." 1993 Or. Laws 792, § 10 (codified as amended at OR. REV. STAT. § 215.700 (2006)). The bill established a "lot of record" provision which allowed local governments to permit dwellings on certain agricultural or forest land that met certain conditions, including that it was acquired by the present owner prior to January 1, 1985. 1993 Or. Laws 792, § 2 (codified as amended at OR. REV. STAT. § 215.705). It also adopted a "high value farmland" category subject to stricter use restrictions. 1993 Or. Laws 792, § 3 (codified as amended at OR. REV. STAT. § 215.710). In response to these legislative enactments, LCDC amended Goal 3 to its present form in 1993.

For a detailed descriptions of the history of agricultural land use amendments, see *Lane County*, 942 P.2d at 281-282; DLCD Farmland Protection Program, *supra* note 74; Sullivan, *supra* note 48, at 456-59; Edward Sullivan, *The Evolving Role of the Comprehensive Plan*, 30 URB. LAW 699, 705-06 (1998); Jeanne S. White, *Beating Plowshares Into Townhomes: The Loss of Farmland and Strategies For Slowing Its Conversion to Nonagricultural Uses*, 28 ENVTL. L. 113, 121 (1998).

78. Permitted non-farm uses now include schools, churches, nonprofit group parks, community centers and also golf courses, personal use airports, wineries, cemeteries and guest ranches. *See* DLCD Farmland Protection Program, *supra* note 74 (listing the approximately 48 non-farm uses currently permitted on land zoned for exclusive farm use).

79. For example, a "lot of record" provision allowed local governments to permit dwellings on certain agricultural or forest land continuously owned since January 1, 1985. 1993 Or Laws 792, § 2 (codified as amended at OR. REV. STAT. § 215.705 (2005)); OR. ADMIN. R. 660-006-0027(1)(a)-(d) (2007). A "high-value farmland" provision, based on soil classification and existing use, such as the cultivation of certain perennials, limits allowable uses on the most productive farmland. OR. REV. STAT. § 215.710 (2005); OR. ADMIN. R. 660-033-020(8) (2007). In response to a 1983 legislative amendment, the LCDC also enacted a "marginal farmland" provision, allowing local governments to relax zoning criteria on certain less productive farmland. *See Lane County*, 942 P.2d at 281, 281 n.3; 1983 Or. Laws 826, § 2. Only two counties, Lane County and Washington County, elected to participate in the marginal lands program, however, and in 1993, the legislature discontinued the program. LCDC subsequently amended its Goal 3 to reflect this change. *See* OR. REV. STAT. § 215.213 (2007) (providing that those counties which elected to participate in the marginal lands program, however, were allowed to continue regulating their land under that program); *Lane County*, 942 P.2d at 281-82 (describing legislative history); *supra* note 77. These amendments and

3. Forest Land

Goal 4's purpose is to preserve the state's forest resources by requiring local governments to inventory, designate, and restrictively zone forest lands.[81] The goal defines forest land as "lands which are suitable for commercial forest uses including adjacent or nearby lands which are necessary to permit forest operations or practices and other forested land that maintain soil, air, water and fish and wildlife resources."[82] Goal 4 limits uses of forest land to (1) uses related to forest operations; (2) conservation of soil, water and air quality, fish and wildlife resources, and appropriate agriculture and recreation; (3) locationally dependent uses, such as communication towers; and (4) dwellings authorized by law.[83] DLCD has promulgated regulations implementing the goal that, in conjunction with the state's zoning and forest management statutes,[84] create a detailed and comprehensive forest land use system with which local governments' plans must comply.[85]

Regulation of forest land, like regulation of agricultural land, has undergone a number of amendments since the initial promulgation of

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counter-amendments to the agricultural land management program reflect a sometimes bitter lack of consensus regarding development and use of agricultural land.

80. One particularly controversial regulation criticized by those seeking to use rural land for non-farm uses requires an owner of "high-value farmland" to demonstrate that she generated at least $80,000 in gross annual farm income from the parcel for two consecutive years, or three of the last five years, before she may site a dwelling on her land. OR. ADMIN. R. 660-033-0135(7) (2007). An owner of other agricultural land must have a parcel of at least 160 acres or must demonstrate that she has generated $40,000 per year in farm income over the same period before she may build a dwelling on her land. *Id.* 660-033-0135(1)(5). *But see* 1000 FRIENDS OF OREGON, THE TOP TEN THINGS YOU NEED TO KNOW ABOUT THE INCOME TEST FOR FARM DWELLINGS 1, http://gw.friends.org/issues/downloads/farmincometopten.pdf (last visited Nov. 5, 2007) (noting that the regulation's $80,000 gross income requirement translates into approximately $12,000-$16,000 in net income, and that the average Oregon farm has gross income of approximately $224,000).

On the other side, observers have criticized the agricultural land system for failing to adequately protect farmland from development. The Oregon Progress Board, an independent state oversight board which monitors the progress of Oregon's 20-year state vision, awarded the state's protection of agricultural land an "F" in 2001, the last year in which it graded the system. *See* OREGON PROGRESS BOARD, ACHIEVING OREGON THE OREGON SHINES VISION: THE 2001 BENCHMARK PERFORMANCE REPORT 65 (2001); OREGON PROGRESS BOARD, ACHIEVING OREGON THE OREGON SHINES VISION: THE 2005 BENCHMARK PERFORMANCE REPORT 58 (2005), *available at* http://www.oregon.gov/DAS/OPB/docs/2005report/05BPR.pdf (noting a 1.4 percent increase between 1992 and 2005 in agricultural land converted for development, and rating the state's progress in protecting agricultural lands as "unknown"); Nyran Rasche, *Protecting Agricultural Lands in Oregon: An Assessment of the Exclusive Farm Use Zone System*, 77 OR. L. REV. 993, 1004 (1998) (arguing that the legislature needs to strengthen protection of agricultural land in Oregon). According to the Farmland Information Center, between 1992 and 1997, nearly 60,000 acres of agricultural land were converted to development uses in Oregon. Farmland Information Center, Oregon Statistics, www.farmlandinfo.org/agricultural_statistics (last visited Nov. 5, 2007).

81. Goal 4, *Goals*, *supra* note 53; John Shurts, *Goal 4 and Nonforest Uses on Forest Lands*, 19 ENVTL. L. 59 (1988) (describing and critiquing Goal 4).

82. Goal 4, *Goals*, *supra* note 53.

83. See OR. ADMIN. R. 660-006-0025 (2007) for a more detailed list of allowable uses on forest land.

84. OR. REV. STAT. §§ 215.700-215.750 (2005).

85. OR. ADMIN. R. 660-006-0000-0060 (2007).

Goal 4.[86] Perhaps the most significant of these amendments was House Bill 3661, passed in 1993,[87] which contained clear criteria for the siting of dwellings on forest land.[88] The 1993 amendment allowed new single-family dwellings on only three types of forest land: (1) "lots-of-record," (2) large tracts, and (3) "template" tracts.[89] Although the forest land use, building, and lot size restrictions have drawn less criticism from property rights advocates than the agricultural land use system,[90] owners of forest land appear to account for many of the early Measure 37 claims.[91]

C. Initial Attempts to Repeal the Land Use System

Since its inception, statewide land use planning in Oregon has generated controversy and faced heated opposition.[92] Support by a majority of the state legislature and the governor's office, however, prevented any major legislative overhaul of the land use planning system; therefore, citizen initiatives assumed the forefront.[93] In 1976, just three years after enactment of S.B. 100, a citizen initiative sought to repeal statewide land

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86. The goal was amended in 1983, 1990, 1993 and 1994. History of Statutes, *supra* note 77.

87. 1993 Or. Laws 792 (codified as amended at OR. REV. STAT. § 215.740 (2005)).

88. Prior to the passage of House Bill 3661, LCDC employed a case-by-case approach of defining allowable dwellings on forest land, an approach that some criticized for creating uncertainty and frustrating reasonable investment expectations of landowners. *See* OREGON DEPARTMENT OF FORESTRY, LAND USE PLANNING HANDBOOK 20-21 [hereinafter HANDBOOK] (2003); Shurts, *supra* note 81, at 59-64 (describing ad hoc approach of LCDC, LUBA, and the courts in determining allowable nonforest uses of forest lands).

89. "Lot of record" dwellings are the same as those permitted on agricultural land. *See supra* note 79. "Large tract" dwellings are permitted on tracts of land of at least 160 acres in western Oregon and at least 240 acres in eastern Oregon. 1973 Or. Laws 792, § 4(2), (3), (5) (codified as amended at OR. REV. STAT. § 215.740 (2005)); OR. ADMIN. R. 660-006-0027(1)(e) (2007). "Template" tracts are small forest land parcels in areas already divided into relatively small parcels and developed with dwellings. 1973 Or. Laws 792, § 4(6), (7), (8) (codified as amended at OR. REV. STAT. § 215.750 (2005)); OR. ADMIN. R. 660-006-0027(1)(f) (2007); *see also* HANDBOOK, *supra* note 88, at 20-23.

90. *But see* LEONARD, *supra* note 5, at 83-84 (discussing early opposition to forest land preservation, especially from counties and landowners on the forested fringes of the Willamette Valley, where growth pressures were intense and the allure of profit from the subdivision of forest land great); Shurts, *supra* note 81, at 59-64 (criticizing LCDC, LUBA, and the courts' failure to establish consistent standards for nonforest uses in forest lands prior to House Bill 3661).

91. Hunnicutt, *supra* note 36, at 29-30 n.17 (stating that vast majority of Measure 37 claims are the result of farm or forest zoning under Goals 3 and 4). One reason the regulation of forest land received less criticism than the regulation of agricultural land may stem from the economic clout of the timber industry in Oregon, which has historically supported forest land use protections. *See* LEONARD, *supra* note 5, at 83-84. Timber companies, however, were major financial supporters of Measure 37, reportedly to slow future land use restrictions of forest practices. *See* Michael Milstein, *Forest Owners See Fairer Future in Measure 37*, OREGONIAN, Dec. 22, 2004, at A01.

92. Opposition to land use planning predated S.B. 100. *See* LEONARD, *supra* note 5, at 35-36 (describing early opposition to land use planning, which sought to restrict the power of county planning authorities and to limit the power of local and state government to interfere in the use of rural lands). Initial opposition to land use planning came from many quarters: people philosophically opposed to land use planning, local officials who objected to state oversight, and individual landowners. *Id.*; *see also* Gordon Oliver & R. Gregory Nokes, *Land-Use Law Showing Its Age*, OREGONIAN, May 31, 1998, at B01 (discussing tumultuous history of land use law).

93. Sullivan, *supra* note 6, at 819 (discussing legislative amendments to land use laws); EDWARD J. SULLIVAN, OREGON'S MEASURE 37—CRISIS AND OPPORTUNITY FOR PLANNING 3 (2005), *available at* http://www.planning.org/PEL/commentary/pdf/Mar05.pdf.

use planning.[94] That ballot measure failed by a margin of 57 percent to 43 percent.[95]

Two years later, another citizen initiative would have rescinded LCDC goals, required legislative approval of any newly promulgated goals, and required compensation of private property owners whose property values decreased as a result of regulation.[96] That measure lost by a margin of 61 percent to 39 percent, losing in thirty-one of thirty-six Oregon counties.[97] Four years later, in 1982, spurred by a deep economic recession, another citizens' initiative would have repealed statewide land use planning.[98] That measure lost by a margin of 55 percent to 45 percent, but it passed in twenty-one of thirty-six counties.[99]

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94. Oregon Repeals Land Use Planning Coordination Statutes, Ballot Measure 10, (1976), *available at* http://bluebook.state.or.us/state/elections/elections19.htm (last visited November 5, 2007); LEONARD, *supra* note 5, at 35-36; CITY CLUB OF PORTLAND, *supra* note 8, at 19.

95. *See* Ballot Measure 10, *supra* note 94.

96. Measure 10 of the 1978 ballot proposed a constitutional amendment that purported to keep in place comprehensive land use planning, while abolishing the LCDC and the goals it promulgated. *Id.* Local governments would have still been required to adopt comprehensive land use plans in conformance with the statewide goals. *Id.* However, the legislature, not LCDC, would have to adopt these goals. *Id.* In addition, the measure would have required the legislature to adopt zoning, planning, and notice procedures to be followed by local governments, and required the state to compensate landowners in areas of statewide significance, where the state could regulate land use directly, if the state imposed land use restrictions that adversely affected the value of their land. *Id.*

Proponents of the measure argued that it would restore accountability to the land use planning system by taking statewide planning out of the jurisdiction of an executive agency and placing it in the legislature. *Id.* Opponents argued that the measure was a veiled attempt by real estate interests to abolish statewide comprehensive land use planning by assigning the legislature the impossible task of quickly promulgating land use goals as well as the local notice, zoning and planning procedures that local governments would have to follow. *See* Office of the Oregon Secretary of State, Election Div., Measure 10, Statements in Opposition, *in* VOTERS' PAMPHLET 57-65 (1978); *see also* LEONARD, *supra* note 5, at 35-36; CITY CLUB OF PORTLAND, *supra* note 8, at 19.

97. Oregon Blue Book: Initiative, Referendum and Recall: 1972-1978, http://bluebook.state.or.us/state/elections/elections19.htm (last visited Nov. 6, 2007); LEONARD, *supra* note 5, at 36.

98. Measure 6 of the 1982 ballot proposed a statutory amendment abolishing LUBA, LCDC, and DLCD, changing statewide goals from mandatory requirements to merely advisory statements, and completely repealing Oregon Revised Statutes § 197, the land use planning statute. ENDS STATE'S LAND USE PLANNING POWERS IN OREGON, RETAINS LOCAL PLANNING, BALLOT MEASURE 6 (1982). The measure required local governments to establish and maintain master land use plans, but these plans did not have to conform to the statewide goals. In effect, land use planning was to be left entirely to local governments, with the state assuming a purely advisory role. *Id.*

Unlike sponsors of earlier—and later—ballot initiatives to repeal statewide land use planning, Measure 6 supporters did not emphasize private property rights. Instead, they argued that statewide land use created too many bureaucratic hurdles for business, thereby impeding economic development. *See* Office of the Oregon Secretary of State, Election Div., Measure 6, Arguments in Favor, *in* VOTERS' PAMPHLET 15-16 (1982). Opponents of the measure, including former Governor McCall, also focused their arguments on economic development. They argued that the measure's loose language would create uncertainty and confusion, which would be even worse for economic development than incremental legislative reform of the system to better accommodate economic development. *See* Office of the Oregon Secretary of State, Election Div., Measure 6, Arguments in Opposition, *in* VOTERS' PAMPHLET 17-18 (1982); *see also* LEONARD, *supra* note 5, at 36-37.

99. Oregon Blue Book: Initiative, Referendum and Recall 1980-1987, http://bluebook.state.or.us/state/elections/elections20.htm (last visited Nov. 6, 2007); CITY CLUB OF PORTLAND, *supra* note 8, at 19-20; KNAAP & NELSON, *supra* note 5, at 191.

Nearly a decade and a half later, the 1998 ballot contained two citizen initiatives aimed at curtailing, although not completely repealing, the statewide land use planning system.[100] The first, Measure 56, required the state and local governments to mail notices describing proposed changes to land use laws or regulations to landowners.[101] That measure passed by an overwhelming margin of 80 percent to 20 percent.[102] The second initiative, Measure 65, would have amended the state constitution to allow citizens to petition the legislature to review administrative rules with which they disagreed.[103] Although the scope of Measure 65 encompassed more than just land use regulation, and the measure received support from a variety of interest groups,[104] its drafters designed the measure as a means of challenging LCDC land use regulations that restricted the siting of dwellings on high-value farmland.[105] The measure failed by a narrow margin, 52 percent to 48 percent.[106]

A driving force behind both of the 1998 measures was Oregonians In Action, a private property rights and land-use reform advocacy group.[107] The organization presented itself as a counterbalance to pro-

100. Land use was a major issue in the 1998 gubernatorial race. Bill Sizemore, the Republican candidate, campaigned on a platform which emphasized overturning the statewide land use planning system and "returning" land use planning to local communities. Jeff Mapes, *Sizemore Finds Property Owners Open to Message*, OREGONIAN, Apr. 5, 1998, at C12. Sizemore led a ballot initiative which would have repealed the statewide planning system through constitutional amendment, but withdrew the initiative after it had been certified but before it made it onto the ballot. *See* Oregon Secretary of State, Elections Division, Initiative, Referendum and Referral Search, http://egov.sos.state.or.us/elec/web_irr_search.record_detail?p_reference=20000004..LSCYYY (last visited Nov. 6, 2007); Robin Franzen, *Farmland Law Sowing a Bitter Debate Around Oregon: A Crop of Controversy: Legacy on the Line*, OREGONIAN, Oct. 19, 1998, at A01.

101. Expands Notice to Landowners Regarding Changes to Oregon Land Use Laws, Ballot Measure 56 (1998) (codified as amended at OR. REV. STAT. § 215.503 (1999)).

102. Official Results, 1998 General Election, State Measure 56, http://www.sos.state.or.us/elections/nov398/other.info/m56.htm (last visited Nov. 6, 2007). Although it passed overwhelmingly, some criticized the measure as undermining support for land use planning because of the high cost of sending out the notices—estimated at $3.5 million per year—that would be borne by LCDC and local governments, and because of the wording of the notices, mandated by the measure, emphasized the potential diminution in property value caused by the proposed land use measure. Editorial, *Let Landowners Know*, OREGONIAN, Oct. 7, 1998, at C12; R. Gregory Nokes, *Ballot Measure Calls for Direct Notification of Land-Use Changes*, OREGONIAN, Sept. 30, 1998, at A14.

103. Amends Oregon Constitution: Creates Process for Requiring Legislature to Review Administrative Rules (Measure 65) (1998), *available at* http://www.sos.state.or.us/elections/nov398/guide/measure/m65.htm (last visited Nov. 6, 2007). The measure would have enabled citizens to challenge any administrative rule issued by a state agency by collecting a requisite number of signatures and petitioning the legislature to approve or disapprove the rule. Under the measure, if the legislature did not act upon receiving such petition during the legislative session following the submission of the petition, the administrative rule would be deemed to have been repealed. *Id.* § 34(3)(a)-(b).

104. R. Gregory Nokes, *Private Property Group Wants Ways to Challenge Administrative Rules*, OREGONIAN, Oct.13, 1998, at A09 (noting that Oregon Right to Life supported the measure, vowing to petition the legislature to overturn administrative rules supporting doctor-assisted suicide).

105. *Id.* (discussing campaign for the measure).

106. Oregon Blue Book: Initiative, Referendum and Recall 1996-1999, http://bluebook.state.or.us/state/elections/elections22.htm (last visited Nov. 6, 2007).

107. Oregonians In Action was founded in the early 1980s by Frank Nims, a former farmer from eastern Oregon. Before transforming itself into a single-issue private property rights organiza-

land use planning groups such as 1000 Friends of Oregon, a watchdog organization formed by former Governor Tom McCall in 1975.[108] Throughout the 1990s, Oregonians In Action gained influence, scoring a major victory representing John and Florence Dolan in their successful challenge to a conditional building permit in *Dolan v. City of Tigard* before the U.S. Supreme Court.[109] The group met with further success in 2000, when it sponsored a citizen initiative amending the state's constitutional takings provision, and the voters approved the measure.[110]

D. Ballot Measure 7 (2000)

The 2000 initiative–Ballot Measure 7–attempted to amend the Oregon Constitution's takings clause[111] to require the state or a local government to compensate a landowner for any law or regulation that restricted the use of the owner's land and "ha[d] the effect of reducing the value of a property upon which the restriction is imposed."[112] The measure would have required the state or local government to compensate a landowner for any restrictive regulation that was "adopted, first enforced or applied" after the current landowner purchased the property, and that continued to apply 90 days after the owner's application for compensation.[113] The compensation due was 100 percent of the difference be-

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tion in 1989, the group championed smaller government, introducing ballot initiatives to reduce pay for legislators, introduce constitutional limits on government spending, disallow voter registration within twenty days of an election and, somewhat bizarrely, prevent teachers from serving in the state legislature. David Hogan, *Land Use Wins Buoy Oregonians In Action*, OREGONIAN, Dec. 25, 2000, at A01; *see also* Patty Wentz, *This Land is Their Land*, WILLAMETTE WEEK, Nov. 28, 2000, at 21 (discussing origins of Oregonians In Action).

108. Governor McCall founded 1000 Friends of Oregon as a statewide land use planning watchdog group to oversee the implementation of S.B. 100. The group has played a major oversight role in the institution of the statewide land use planning system, reviewing local government comprehensive plans for consistency with statewide goals, working with local governments to improve their land use planning, and challenging planning decisions inconsistent with the goals before LUBA and the state courts. *See* 1000 Friends of Oregon: History, http://www.friends.org/about/history.html (last visited Nov. 6, 2007).

109. 512 U.S. 374 (1994). *See generally* Colloquium, Dolan*: The Takings Clause Doctrine of the Supreme Court and the Federal Circuit*, 25 ENVTL. L. 111 (1995). In 1991, Oregonians In Action established a legal center to represent landowners in test cases at no charge. The group was also successful in lobbying for legislative changes to Oregon's land use. *See* Hogan, *supra* note 107 (reporting that the state's Republican-controlled legislature enacted 13 pieces of legislation authored by Oregonians In Action into law in 1999).

110. The measure was originally proposed by Bill Sizemore and his Oregon Taxpayers United organization, but Oregonians In Action took over the process of getting the measure approved and campaigning for its adoption by the voters. CITY CLUB OF PORTLAND, *supra* note 8, at 22-23 (describing origin of Measure 7); Hogan, *supra* note 107. Oregonians In Action's political action committees reportedly spent about $880,000 on Measure 7. *Id.* During its Measure 7 campaign, Oregonians In Action highlighted the stories of sympathetic landowners whose property had allegedly lost value due to land use planning, including Dorothy English, an elderly widow living in north Portland whose story would be used to great effect again in the 2004 Measure 37 campaign. *See* R. Gregory Nokes, Scott Learn & Harry Esteve, *Property Measure Battles Lie Ahead*, OREGONIAN, Nov. 9, 2000, at C01.

111. OR. CONST. art. I, § 18.

112. Measure 7, *supra* note 2.

113. *Id.* § (d). The "first enforced or applied" language implied that the measure might have retroactive effect. For instance, a landowner whose land was already subject to a land use restriction

tween the fair market value of the land before and after the application of the regulation, which expressly included "net cost to the landowner of an affirmative obligation to protect, provide, or preserve wildlife habitat, natural areas, wetlands, ecosystems, scenery, open space, historical, archeological or cultural resources, or low income housing."[114]

Measure 7 would not have required the state or local governments to compensate landowners for (1) "historically and commonly recognized nuisance laws,"[115] (2) regulations "to implement a requirement of federal law,"[116] or (3) "regulations prohibiting the use of a property for the purpose of selling pornography, performing nude dancing, selling alcoholic beverages or other controlled substances, or operating a casino or gaming parlor."[117] These exceptions would reappear in Measure 37.

Unlike Measure 37, Measure 7 contained no express provision allowing government to waive a land use regulation rather than pay compensation to a claimant, prompting controversy over whether, and under what circumstances, governments could avoid compensating claimants. The Attorney General interpreted the measure's requirement of compensation only when a land use regulation "continues to apply to the property ninety days after the owner applies for compensation" to permit gov-

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at the time she purchased it might nonetheless be entitled to compensation if neither she nor a previous landowner had ever applied to use the land in a manner prohibited by the land use regulation. *See* CITY CLUB OF PORTLAND, *supra* note 8, at 26 (noting that land use lawyers interviewed by the City Club expressed their opinion that the measure might have this sort of retroactive effect). *But see* R. Gregory Nokes, *Judge Blocks Property Measure*, OREGONIAN, Dec. 7, 2000, at A01 (citing an Oregonians In Action lawyer asserting that he did not believe the measure had retroactive effect).

The Oregon Attorney General, in an opinion interpreting Measure 7's provisions, also concluded that "first enforced or applied" might have retroactive effect. 49 Or. Op. Att'y. Gen. 284 (2001), 2001 Ore. AG LEXIS 3. He stated: "[T]he the right to compensation created by Measure 7 applies prospectively, i.e., where the government passes or enforces a regulation after the effective date of Measure 7. Measure 7 does not create a right to compensation if both of those government actions were taken before the Measure's effective date." *Id.* at *99. But, "the voters intended the Measure to require compensation for the future (post-Measure 7) enforcement of existing (pre-Measure 7) regulations, where the regulation was 'adopted, first enforced or applied' after the owner in question became the owner." *Id.* at *112.

114. Measure 7, *supra* note 2, at § (e). Other states, notably Florida and Texas, adopted landowner compensation statutes that compensate landowners for loss to property value caused by government action. Florida's "Bert J. Harris, Jr., Private Property Rights Protection Act" measures compensation due landowners as "compensation for the actual loss to the fair market value of the real property caused by the action of government." FLA. STAT. § 70.001(2) (2007). Texas' statute provides for compensation in the amount of "damages suffered by the private real property owner as a result of the [government action]," to be determined by a state court hearing the action. TEX. GOV'T CODE ANN. § 2007.024(b) (2007). However, both of these states' statutes are triggered only when the decrease in value due to government regulation is substantial (25 percent in Texas, "inordinately burden[some]" in Florida). FLA. STAT. §§ 70.001(2), (3)(e); TEX. GOV'T CODE ANN. § 2007.002(5)(B)(ii). These and other states' compensation statutes are discussed in more detail *infra* at notes 226, 229.

115. Measure 7, *supra* note 2, at § (b). The measure would have required that these laws "shall be narrowly construed in favor of a finding that just compensation is required under this section." *Id.*

116. *Id.* § (c). The measure would have required that the state or local government impose these regulations "to the minimum extent required." *Id.*

117. *Id.*

ernments in some circumstances to waive land use regulations rather than pay compensation.[118] He opined that state agencies could waive land use regulations rather than pay compensation when (1) their rules and enabling statutes gave them discretion to do so,[119] or (2) they did not have sufficient funds allotted or appropriated to cover the compensation cost.[120] A number of local governments adopted ordinances in response to Measure 7 which allowed them to waive offending land use laws rather than compensate claimants, although considerable controversy surrounded their authority to do so.[121]

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118. *Id.* § (d). The Attorney General issued a detailed opinion interpreting Measure 7's provisions, including whether the measure allowed for state agencies to waive rather than compensate. Or. Op. Atny. Gen., *supra* note 113, at *318; *see also* David Steves, *Oregon Attorney General Cites Impact of New Land-Rights Law*, REGISTER-GUARD (Eugene, Or.), Feb. 14, 2001, *available at* 2001 WLNR 7663828 (citing Attorney General Hardy Myers stating that the opinion was produced by 20 lawyers at the Department of Justice over three months in an attempt to objectively interpret the measure).

119. According to the Attorney General, the measure's 90-day language allowed "[a] state agency [to] forego enforcement of regulations restricting the use of private real property if the agency's rules and enabling statutes give it discretion to do so." Or. Op. Atty. Gen., *supra* note 113, at *11. The Attorney General explained further that:

> Because Measure 7 provides that compensation is due only where the regulation 'continues to apply' 90 days after the claim is made, it may be suggested that Measure 7 itself authorizes state agencies to forego enforcement of regulations. However, Measure 7 itself provides no express powers to state agencies and does not authorize agencies to forego enforcement of regulations restricting the use of private real property. Consequently, we must look to existing law to determine whether the agency has the discretion to choose whether or not to enforce the regulation.

Id. at *155.

120. The Attorney General stated:

> If a state agency's enabling statutes or rules do not give the agency discretion to forego enforcement of a regulation restricting the use of private real property, the agency must enforce that regulation as long as it has money within its appropriation and allotments to pay valid Measure 7 claims. An agency must include in its allotment estimate an amount for valid Measure 7 claims that will be due in the upcoming allotment period, and DAS must approve an allotment sufficient to pay such claims as long as the agency has appropriated funds available to pay the claims and to carry out the agency's mandatory duties for the remainder of the biennium, even if doing so will require the agency to discontinue or cut back on other statutory, but nonmandatory, activities. If, before the end of the biennium, the agency no longer has sufficient funds to perform all of its mandatory activities, the agency must determine which of its conflicting statutory mandates are primary. In no event, however, may the agency incur obligations in excess of its allotment or appropriation; at that point, the agency would no longer be required to perform its mandatory statutory duties. If the obligation to pay a Measure 7 claim would result in a debt limit violation, not only may the agency no longer enforce the regulation giving rise to the claim, but the statute requiring such regulation would no longer apply; at that point, the statute would cease to have legal force or effect.

Id. at *11-*12; *see also id.* at *162--*172 (discussing in greater detail the Attorney General's opinion as to how agencies must budget for Measure 7 claims and under what circumstances agencies could waive regulations because they lacked funds to cover the compensation costs).

121. *See* CITY CLUB OF PORTLAND, *supra* note 8, at 27 (stating that the intent of the grace period was to allow local government to waive the regulation rather than pay compensation, but noting "significant debate" regarding this point "since the measure does not specifically authorize waiver"); Jeff Barnard, *Oregon Girds for Measure 7 Fallout*, COLUMBIAN (Vancouver, WA), Jan. 28, 2001, at C2 (reporting that numerous cities and counties enacted ordinances allowing them to waive enforcement of regulation rather than compensate Measure 7 claimants); R. Gregory Nokes, *1000 Friends Sues 23 Cities*, OREGONIAN, Dec. 22, 2000, at B01 (discussing an action filed with

Voters adopted Measure 7 in November 2000 by an unofficial margin of 54 percent to 46 percent, approving it in thirty of thirty-six counties.[122] Led by Oregonians In Action, proponents argued that the measure restored "balance" to the system by "forc[ing] regulators to consider the impacts on property owners of imposing restrictions on the use of property before doing so,"[123] and by remedying what they viewed as judicial erosion of the takings clause by the Oregon Supreme Court.[124] Opponents, including 1000 Friends of Oregon, then-governor John Kitzhaber, and the state treasurer, maintained that the measure would cost the state as much as $5.4 billion annually and make statewide land use planning impossible.[125] Despite its potentially high cost and broad fiscal implications, Measure 7 garnered little public attention or debate during the 2000 election.[126]

LUBA by 1000 Friends of Oregon, a group opposed to Measure 7, challenging local governments' authority to waive state land use laws in response to Measure 7 claims).

122. As discussed below, because of the legal challenge to the measure, the election results were never officially certified. Unofficial County Results on Measure 7 as of November 14, 2000, http://www.orcities.org/Portals/17/A-Z/m7ns022.pdf (last visited Nov. 6, 2007).

123. *See* Measure 7, Arguments in Favor, http://www.sos.state.or.us/elections/nov72000/guide/mea/m7/7fa.htm (last visited Nov. 6, 2007). Oregonians In Action and its directors accounted for half of the "Arguments in Favor" included in the Measure 7 pamphlet received by voters. There were two filings by Bill Moshofsky, full-time volunteer at Oregonians In Action, on behalf of the Just Compensation for Regulatory Takings Committee, two filings by Larry George, then executive director of Oregonians In Action, on behalf of the Oregon Family Farm PAC, and one filing by Frank Nims, then president of the group, on behalf of Oregonians In Action. *Id.*

Other supporters of the measure included United Oregon Taxpayers, which argued that Measure 7 would more widely spread the property taxes burden and lessen the pressure to increase property taxes on current taxpayers; the Oregon Cattlemen's Association; the Oregon State Grange; and Dan Dolan, of *Dolan v. City of Tigard* fame, who argued that the measure would have saved taxpayers the $1.5 million for which the City of Tigard ended up settling the Dolans' regulatory takings claim for land valued at $14,000. *Id.*

124. Hunnicutt, *supra* note 36, at 34-35 (arguing that the Oregon Supreme Court's regulatory takings decisions failed to coherently define factors that should be considered in analyzing a takings claim under the state constitution); *see* Dodd v. Hood River County, 855 P.2d 608, 615 (Or. 1993) (holding that zoning law preventing siting of a dwelling on land purchased for $33,000 was not a taking because $10,000 worth of timber was left on the property, since that constituted some substantial beneficial use); Fifth Ave. Corp. v. Washington County, 581 P.2d 50, 60 (Or. 1978) (deciding that no taking occurs under the Oregon constitution if the owner retains some substantial use of the property); *see also* Cope v. City of Cannon Beach, 855 P.2d 1083, 1084-86 (Or. 1993) (finding a municipal ordinance prohibiting rental of dwellings in residential areas for less than 14 days at a time not to be a taking under the Fifth Amendment of the U.S. Constitution because the ordinance advanced a legitimate municipal interest and left other economically viable uses of the property); CITY CLUB OF PORTLAND, *supra* note 8, at 16.

125. Measure 7, Arguments in Opposition, http://www.sos.state.or.us/elections/nov72000/guide/mea/m7/7op.htm (last visited Nov. 6, 2007). The voters pamphlet included 30 Arguments in Opposition to Measure 7, most emphasizing the measure's vague wording, high cost, and undermining effects on health and safety regulations governing property. *Id.*; *see also* Editorial, *Vote No on Measure 7*, OREGONIAN, Oct. 9, 2000, at B08.

126. CITY CLUB OF PORTLAND, *supra* note 8, at 23 (noting that Measure 7 did not become a focal issue in the campaign, and that most commentators thought it had little chance of approval); Carl Abbott, Sy Adler & Deborah Howe, *A Quiet Counteroffensive in Land Use Regulation, The Origins and Impact of Oregon's Measure 7*, 14 HOUSING POL'Y DEBATE 383, 389 (2003), *available at* http://www.fanniemaefoundation.org/programs/hpd/pdf/hpd_1403_abbott.pdf (discussing politics of Measure 7 and its aftermath); Editorial, *The Sleeper*, OREGONIAN, Nov. 2, 2000, at D14; Wentz, *supra* note 107 (commenting on Measure 7's unlikely passage).

After the election, many local governments passed ordinances to implement Measure 7.[127] But before the measure went into effect, a group of local governments, land use organizations, and individuals challenged its constitutionality in Marion County Circuit Court on a number of grounds,[128] including the claim that Measure 7 violated the state constitution's "separate vote" provision, which requires that each constitutional amendment be voted on individually.[129] In December 2000, the plaintiffs won a preliminary injunction, effectively freezing the implementation of Measure 7.[130] In February 2001, the circuit court granted the plaintiffs' summary judgment motion, declaring Measure 7 invalid because it violated both the state Constitution's "separate vote" and "full text" clauses.[131]

The state appealed this decision to the court of appeals, which certified the appeal to the state supreme court, which in turn upheld the circuit court's invalidation of the measure, agreeing that it violated the state constitution's "separate vote" provision.[132] The supreme court concluded that Measure 7 actually contained two constitutional amendments. The first was an explicit amendment of the state's takings clause.[133] The sec-

127. *See* Nokes, *supra* note 121.

128. Plaintiffs brought their challenge before the Secretary of State had finished the constitutionally required canvassing of the Measure 7 votes, and before the Governor had certified the outcome. OR. CONST. art. XVII, § 1; League of Or. Cities v. Oregon, No. 00-C-20156 1, 2 (Marion County Cir. Ct., Feb. 22, 2001), *available at* http://www.orcities.org/AZIndex/tabid/810/ctl/ItemView/mid/1421/categoryid/37/itemtitleid/358/type/a/Default.aspx. The plaintiffs alleged that Measure 7 had been unconstitutionally enacted in violation of the constitution's "one subject" requirement (OR. CONST. art. IV, § 1(2)(d)), the constitutional prohibition on "revisions" through the initiative process (OR. CONST. art. XVII, § 2), "full text" requirement (OR. CONST. art. IV, § 1(2)(d)) and the "separate vote" requirement (OR. CONST. art. XVII, § 1).

129. OR. CONST. art. XVII, § 1 ("When two or more amendments shall be submitted . . . to the voters of this state at the same election, they shall be so submitted that each amendment shall be voted on separately."). Amendments are separate if they are "substantive" and not "closely related." League of Or. Cities v. Oregon, 56 P.3d 892, 904 (Or. 2002) (citing Armatta v. Kitzhaber, 959 P.2d 49 (Or. 1998)).

130. *League of Or. Cities*, No. 00-C-20156, at 2.

131. *Id.* at 21. The "full text" clause of the Oregon constitution requires that an initiative petition include the full text of the proposed law or amendment to the constitution. OR. CONST., art. IV, § 1(2)(d). The circuit court concluded that Measure 7 violated the provision because, despite containing the full text of the provisions it proposed to add to the constitution, it did not give notice of the other constitutional and statutory provisions it would substantively modify. *League of Or. Cities*, No. 00-C-20156, at 10-13. For example, the measure changed the definition of "just compensation" to include reasonable attorneys fees and expenses necessary to collect compensation when compensation is not paid within 90 days. The court determined that the new definition significantly affected existing condemnation provisions, and both local ordinances and state statutes which set forth the time frames and processes for condemnation actions would have to be amended. *Id.* at 10. Since "nothing in the text of the measure gives notice to the voters of this direct and substantial change to the constitution," the circuit court concluded that the measure violated the full text clause. *Id.*

132. *League of Or. Cities*, 56 P.3d at 896-97, 911. Because the court found the measure violated the separate vote clause, it did not address whether the measure also violated the full text clause. *Id.* at 897 n.5.

133. Prior to the adoption of Measure 7, the takings provision, OR. CONST. art. I, § 18, required compensation only when a property owner demonstrated that the government regulation deprived the owner of all economically viable use of the property. *See* Fifth Ave. Corp. v. Wash. County, 581 P.2d 50, 60, 63 (Or. 1978); Dodd v. Hood River County, 855 P.2d 608, 614-15 (Or. 1993). Measure

ond was an implicit amendment to the Constitution's free speech clause.[134] The court determined that the amendment of the free speech clause was not "closely related" to the amendment of the takings clause, and therefore Measure 7 violated the separate vote provision of the Oregon Constitution and was invalid.[135]

II. BACKGROUND OF MEASURE 37

Following the Oregon Supreme Court's invalidation of Measure 7 on state constitutional grounds in October 2002, Oregonians In Action repackaged the measure as a proposed statutory amendment and successfully petitioned for its inclusion as Ballot Measure 37 on the 2004 ballot.[136] The 2004 campaign was even more successful than the Measure 7 campaign had been four years earlier. Voters adopted Measure 37 by a margin of approximately 61 percent to 39 percent, approving it in all but one of Oregon's thirty-six counties.[137]

A. The Measure 37 Campaign

Unlike Measure 7, Measure 37 attracted considerable publicity prior to the 2004 election.[138] Both proponents and opponents of the measure

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7 explicitly amended the takings clause by requiring just compensation for any reduction in the value of private real property resulting from the enforcement of a restrictive regulation enacted or first enforced before a landowner acquired a tract. The measure thus substantively amended the takings clause. *League of Or. Cities*, 56 P.3d at 905-06.

134. The measure implicitly amended the free speech clause, OR. CONST. art. I, § 8, by allowing the state or local governments to deny Measure 37 benefits to landowners engaged in the sale of pornographic material. Measure 7, *supra* note 2, at § (c) ("Nothing in this 2000 Amendment shall require compensation due to a government regulation prohibiting the use of a property for the purpose of selling pornography, performing nude dancing, selling alcoholic beverages or other controlled substances, or operating a casino or gaming parlor."). *Id.* The free speech clause provides that "no law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever[.]" OR. CONST. art. I, § 8. The court explained that the constitution's free speech clause not only guarantees that the state will not explicitly target expression, but also that "the state or a local government may not treat those who sell expressive material 'more restrictively' than those who sell other merchandise." *League of Or. Cities*, 56 P.3d at 908 (citing City of Eugene v. Miller, 871 P.2d 454 (1994)). Thus, by requiring state and local governments to confer benefits on some landowners whose land they restrictively regulate, but not on other landowners because they are engaged in a constitutionally protected expressive activity, Measure 7 violated the constitution's free speech guarantee. Because Measure 7 required this disparate treatment, it changed the scope of the rights guaranteed under the free speech clause, thus constituting an amendment of Article I, § 8. *League of Or. Cities*, 56 P.3d at 892, 908.

135. *League of Or. Cities*, 56 P.3d at 910-11.

136. Measure 37, *supra* note 1; *see* Hunnicutt, *supra* note 36, at 41 (stating that drafters of Measure 37 took their cue from the Oregon Supreme Court's invalidation of Measure 7 to draft Measure 37 as a statute rather than a constitutional amendment).

137. Hunnicutt, *supra* note 36, at 41; *see also* Oregon Secretary of State, General Election Abstract of Votes on State Measure No. 37 (Nov. 2, 2004), http://www.sos.state.or.us/elections/nov22004/abstract/m37.pdf (last visited Nov. 6, 2007).

138. Unlike the 2000 ballot, in which Measure 7 was among a total of 26 citizen measures, the 2004 ballot included only eight citizen measures. *Compare* Official 2000 General Election Online Voters' Guide, Measures, http://www.sos.state.or.us/elections/nov72000/meas.htm (last visited Nov. 6, 2007) *with* Official 2004 General Election Online Voters' Guide, Measures, http://www.sos.state.or.us/elections/nov22004/g04abstract.html (last visited Nov. 6, 2007). But other controversial ballot measures, such as a constitutional amendment banning same-sex marriage, vied with Measure 37 for voter attention. In fact, after the election, the Oregonian ran an editorial by

raised large amounts of funding and waged expensive publicity campaigns in support of their positions.[139]

The Oregon timber industry, which viewed the measure as a means of curbing future state regulation of timber land, was the biggest funder of the campaign in support of Measure 37.[140] Individual landowners and 1000 Friends of Oregon provided the bulk of funding for the campaign against Measure 37.[141] The campaign in support raised approximately $1.2 million,[142] expending approximately $1 million on media advertisements.[143] The campaign in opposition raised over twice as much, approximately $2.7 million,[144] spending approximately $2 million on media advertisements.[145]

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its public editor criticizing the paper for failing to adequately focus on Measure 37 in the midst of competing initiatives. *See* Michael Arrietta-Walden, *The Public Editor, Measure 37 Coverage Was Too Limited, Late*, OREGONIAN, Nov. 14, 2004, at B01 (noting that the paper devoted more coverage to several other measures, including one to ban same-sex marriage and one attempting to dismantle the state accident insurance fund, than it did to Measure 37).

139. Proponents of Measure 37 raised money and campaigned primarily through an organization called the "Family Farm Preservation PAC" (although Oregonians In Action PAC also received contributions, mainly from individuals). *See* Alex Pulaski, *Election 2004: Measure 37: Property Compensation: Land's Uses, Limits at Stake*, OREGONIAN, Oct. 24, 2004, at D01. Opponents of the measure acted through the "No on 37 Take A Closer Look Committee." *See* Takings Initiatives, Oregon Opponent Reports, http://www.takingsinitiatives.org/index.php?option=com_content&task=view&id=78&Itemid= (last visited Nov. 6, 2007).

140. *See* Family Farm Preservation PAC, Electronic Filing Report, Cash Contributions, Loans Received and In-Kind, 3-10 (Sept. 23, 2004); Family Farm Preservation PAC, Electronic Filing Report, Cash Contributions, Loans Received and In-Kind, 3-8 (Dec. 1, 2004), *available at* http://www.takingsinitiatives.org/index.php?option=com_content&task=view&id=69&Itemid= (last visited Nov. 6, 2007); Michael Milstein, *Forest Owners See Fairer Future in Measure 37*, OREGONIAN, Dec. 22. 2004, at A01 (stating that the timber industry "supplied almost $3 of every $4 that buoyed the ballot initiative to an easy victory"). The Family Farm Preservation PAC also received substantial funding from real estate and development interests. *See* Pulaski, *supra* note 139, at D01 (noting that contributions from identifiable real estate and development companies accounted for 10 percent of all contributions to the Family Farm Preservation PAC).

141. *See* No on 37 Take A Closer Look Committee, Electronic Filing Report, Cash Contributions, Loans Received and In-Kind, 3-129 (Sept. 23, 2004), *available at* http://www.takingsinitiatives.org/index.php?option=com_content&task=view&id=78&Itemid= (last visited Nov. 6, 2007). 1000 Friends of Oregon contributed approximately $100,000 to the campaign. *Id.* A single winemaker, Eric D. Lemelson, contributed $500,500 to the campaign, and his mother contributed another $85,000. *See* Janie Har, *Voters Back Beliefs With Bucks*, OREGONIAN, Oct. 23, 2004, at B01.

142. Hunnicut, *supra* note 36, at 39 n.93.

143. George Advertising Inc., was the campaign's media agent. Family Farm Preservation PAC, Electronic Filing Report, Cash Expenditures and Loan Payments, 7- 10 (Oct. 21, 2004); Family Farm Preservation PAC, Electronic Filing Report, Supplement to Second Pre-election – Expenditures, 1 (Oct. 29, 2004); Family Farm Preservation PAC, Electronic Filing Report, Cash Expenditures and Loan Payments, 9-11 (Dec. 1, 2004), *available at* http://www.takingsinitiatives.org/index.php?option=com_content&task=view&id=69&Itemid= (last visited Nov. 6, 2007); *see also* Pulaski, *supra* note 139, at D01 (noting that George Advertising, Inc., was run by Larry George, former executive director of Oregonians In Action).

144. *See* No to 37 Take A Closer Look Committee, Electronic Filing Report, Summary Statement of Contributions and Expenditures, 1 (June 24, 2005), *available at* http://www.takingsinitiatives.org/storage/tmap/documents/Finance%20Filings%202004/Take%20a%20Closer%20Look%20Committee%202005%20Supplemental%20Report.pdf (last visited Nov. 6, 2007).

145. MacWilliams and Robinson was "Take Closer Look's" media agent. *See* No on 37 Take A Closer Look Committee, Electronic Filing Report, Cash Expenditures and Loan Payments, 130-41

Despite having more money, opponents of Measure 37 were unable to successfully counter the media message of Measure 37 proponents. The pro-Measure 37 campaign focused its argument on fairness and simplicity, concentrating on the theme that government should pay for what it takes.[146] The simplicity of the campaign's message was encapsulated in the measure's ballot title, which proponents succeeded in having the secretary of state approve without opposition: "Government must pay owners, or forgo enforcement, when certain land use restrictions reduce property value."[147] The proponents of Measure 37 were also extremely successful in their radio and television campaign, which spotlighted sympathetic individual land owners, including the elderly and the disabled, whose dreams of developing their land were allegedly thwarted by seemingly extreme or arbitrary government action.[148]

(Sept. 23, 2004); No on 37 Take A Closer Look Committee, Electronic Filing Report, Cash Expenditures and Loan Payments, 7 (Oct. 18, 2004); No on 37 Take A Closer Look Committee, Electronic Filing Report, Cash Expenditures and Loan Payments, 96-100 (Oct. 21, 2004); No on 37 Take A Closer Look Committee, Electronic Filing Report, Supplement to Second Pre-Election – Expenditures, 4 (Oct. 25, 2004); No on 37 Take A Closer Look Committee, Electronic Filing Report, Cash Expenditures and Loan Payments, 43-46 (Dec. 2, 2004), *available at* http://www.takingsinitiatives.org/index.php?option=com_content&task=view&id=78&Itemid= (last visited Nov. 6, 2007).

146. Its proponents argued that Measure 37 would provide a simple system for landowners to recover lost property value caused by land use regulation. Instead of having to undertake allegedly costly, time-consuming, and often futile compensation litigation in state courts to seek compensation when government action devalued their land, Measure 37 would allow landowners to simply file a compensation claim with the state or local government, forcing the government to either compensate or waive regulation within a relatively short time. *See* Official 2004 General Election Online Voters' Guide, Measure 37, Arguments in Favor, http://www.takingsinitiatives.org/storage/tmap/documents/Measure%2037%20-%20Arguments%20in%20Favor.pdf (last visited Nov. 6, 2007) [hereinafter 2004 Voters' Pamphlet]; Sullivan, *supra* note 93, at 5-6.

147. Under Oregon law, ballot titles must be filed with the secretary of state and certified by the Attorney General, OR. REV. STAT. § 250.067 (2005), or, if challenged, by the state Supreme Court. § 250.085. Getting a favorable ballot title certified is perhaps the most important element of a citizen initiative campaign, because the title is the only thing that appears on the ballot itself. *See* Sullivan, *supra* note 93, at 6 (discussing importance of ballot title); Hunnicutt, *supra* note 36, at 41 (same); *see also* Press Release, Bill Bradbury, Oregon Secretary of State, Certified Ballot Title for Measure 37 (Apr. 22, 2003), http://www.sos.state.or.us/elections/irr/2004/036cbt.pdf. In the case of Measure 37, the ballot title was not challenged by opponents. *See* Sullivan, *supra* note 93, at 6.

148. Sullivan, *supra* note 93, at 6 (pointing out that these images were ones that voters could take with them to the ballot box). One commentator has also argued that, since most voters in 2004 were not Oregon residents when the land use planning system was originally enacted, they had no visceral sense of the state's land use program to counterbalance the pro-Measure 37 campaign's heart-string individual pleas. *Id.*; *see also* Josh Israel, Takings Initiatives Accountability Project, Ad Wars 2004 (Oct. 3, 2006) [hereinafter Ad Wars 2004], http://www.takingsinitiatives.org/index.php?option=com_content&task=view&id=87&Itemid=54 (explaining the media campaign and providing links to the actual television and radio commercials).

The campaign advertisements focused on anecdotal evidence of seemingly arbitrary restrictions placed upon individual landowners (e.g. a $15,000 citation of a Portland homeowner for cutting down blackberry bushes in her backyard, and ranchers who were allowed to build on their ranch but were required to "move out for four months of the year, so as not to disturb the wildlife"), arguing that government had "found a loophole in the law" and was now "taking private property from Oregonians without compensation." *See* Ad Wars 2004 ("Yes on 37" Television Ads 1-3).

A majority of the 42 "Arguments in Favor" accompanying Measure 37 in the Voters' Pamphlet were signed by individuals relating their own personal stories, asserting that Measure 37 would restore to them what the government had taken away. *See* Argument in Favor of Barbara and Eugene Prete, 2004 Voters' Pamphlet, *supra* note 146, at 16-17 (veteran could not build on property

Opponents of Measure 37 stressed a number of arguments, but they failed to settle on a clear, simple message to counterbalance the message of the measure's proponents. The opponents argued that the measure would cost too much to implement,[149] would damage farming in Oregon and the state's quality of life, was poorly drafted and would create uncertainty, and was unfair, treating neighboring property owners disparately, depending on when they had purchased their land. The opponents adopted "Take a Closer Look" as their slogan, and their media campaign focused on drawing voters' attention to the details of the bill in which, they argued, lay dangerous flaws. Television and radio commercials proclaimed, without much explanation, that the measure would "let government change the rules as they went along," which sounded remarkably similar to what proponents of Measure 37 said the measure would remedy.[150]

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bought for retirement); Argument in Favor of Tim and Casey Heuker, 2004 Voters' Pamphlet, *supra* note 146, at 13-14 (couple unable to rebuild home after fire destroyed it); Argument in Favor of Matt Roloff, 2004 Voters' Pamphlet, *supra* note 146, at 10-11 (former president of Little People of America, unable to run farm as tourist attraction because of competitor's complaints); Argument in Favor of Dorothy English, 2004 Voters' Pamphlet, *supra* note 146, at 3-4 (elderly woman unable to subdivide her property for children and for sale to support retirement).

The 2004 Voters' Pamphlet also included several entries from the chief petitioners for the measure correcting allegedly false statements by the measure's opponents and attempting to explain the intentions behind certain Measure 37 provisions "so to avoid [sic] the courts from misinterpreting our intent behind this measure, as the Oregon courts have a habit of doing." Argument in Favor of Dorothy English, Barbara Prete and Eugene Prete, 2004 Voters' Pamphlet, *supra* note 146, at 29. The pamphlet also included two presumably satirical entries lampooning wildcat developers from southern California and seeking property owners who want to "$$$ Make Money Fast With Measure 37! $$$." Argument in Favor of Peter Bray, 2004 Voters' Pamphlet, *supra* note 146, at 33-35.

149. The estimate of financial impact statement accompanying Measure 37 on the ballot was that the measure would cost between $64 and $344 million per year in state and local government administrative expenditures. Official 2004 General Election Online Voters' Guide, Measure 37, Ballot Title, 1, http://www.takingsinitiatives.org/storage/tmap/documents/Measure%2037%20-%20Ballot%20Title.pdf (last visited Nov. 6, 2007). The financial impact statement stated that the amount of expenditures needed to pay for compensation claims under the measure could not be determined. *Id.*

150. Ad Wars 2004, *supra* note 148 ("No on 37" Television Ad 1: "Take a Closer Look"). The campaign in opposition to Measure 37 ran ads featuring farmers and scenes of farmland. They stressed that the measure would be costly, unfair, and arbitrary. Nearly every add emphasized the measure's large administrative costs, used catch-phrases such as "higher taxes" and "red tape," and ended by imploring voters to "take a closer look" at the measure, and vote no. The ads lacked the emotional appeal of the proponents ads, in part because the thrust of their message was that when voters more closely and rationally examined the measure, its faults would become apparent. *Id.*; *see also* Laura Oppenheimer, *Breaking Ground Landowners Who Fought for Measure 37 Ready the First Case*, OREGONIAN, Nov. 22, 2004, at A01 (discussing some of the individuals whose personal stories figured prominently in the Measure 37 campaign). This message was cumbersome in comparison to the proponents' simple invocation of fairness to individual landowners.

The Voters' Pamphlet included 41 "Arguments in Opposition," including submissions by Governor Ted Kulongoski, Oregon's Secretary of State and the state treasurer, former governors Victor Ateyeh and John Kitzhaber, several former Oregon judges, and a number of mayors, as well as conservation groups and agricultural associations. 2004 Voters' Pamphlet, Arguments in Opposition, *supra* note 146, at 1-34. The submissions highlighted the high cost of the measure and the increased tax burdens it would impose, the administrative red tape the measure would create, the poor drafting of the measure, and the importance of protecting farmland. Noticeably absent from the Arguments in Opposition were the human-interest stories employed by the proponents of the measure. *See id.*

B. Measure 37's Provisions

Measure 37 promises to compensate a landowner for any value lost due to regulatory restrictions imposed upon her land after she or a family member acquired the land.[151] Like Measure 7, Measure 37 operates retroactively, offering compensation to landowners for past[152] as well as future land use regulations.[153] In a significant departure from Measure 7, Measure 37 explicitly allows the governing body "responsible for enacting"[154] the regulation to "modify, remove, or not apply" the regulation with respect to a claimant instead of compensating her.[155]

An aggrieved landowner must make her claim under Measure 37 by providing written notice to the governing body "enacting or enforcing" the land use regulation.[156] The governing body then has 180 days within which to determine whether the applicant is entitled to compensation or to waive or modify the regulation as applied to the applicant.[157] If the offending regulation continues to apply to the applicant's property 180 days after her application, the applicant has a cause of action for compensation under the measure against the government in the circuit court

151. Section 1 provides, "If a public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to the effective date of [Measure 37] that restricts the use of private real property or any interest therein and has the effect of reducing the fair market value of the property, or any interest therein, then the owner of the property shall be paid just compensation." Measure 37, *supra* note 1. Sections 1 and 8, which allow waiver of the regulation in lieu of compensation, are at the heart of Measure 37's promise to landowners. *See* Hunnicutt, *supra* note 36, at 42.

152. Measure 37, *supra* note 1, at § 1. When government "enforces a land use regulation enacted prior to the effective date of" the measure. *Id.*

153. When government "enacts or enforces a new land use regulation." *Id.* In addition, the measure gives a current owner who acquired property from a member of her family a right to compensation for value lost due to land use restrictions enacted during the tenure of her family's previous ownership of the property. *Id.* § 3(E). Measure 37's retrospective reach far surpasses its predecessor's. Measure 7 provided a right to compensation for value lost to land use laws enacted or enforced after the date of the measure's enactment or land use laws "first enforced or applied" after the measure's passage. Measure 7, *supra* note 2, at § (d). However, the measure contained no provision requiring compensation to current landowners for land use laws enacted during the tenure of their family member's ownership of the property. *See id.* (stating "[c]ompensation shall be due the property owner if the regulation was adopted, first enforced or applied after the current owner of the property became the owner . . . ."). Interpreting Measure 7, the Oregon Attorney General further limited the scope of the measure's compensation requirement, concluding "that the voters intended the phrase 'was first . . . enforced or applied after the current owner . . . became the owner' to mean that any action by *any* government entity as to *any* property subject to the regulation to carry the regulation into force or effect precludes owners who acquired their property after that action from qualifying for compensation." Or. Op. Att'y. Gen. *supra* note 113, at *1, *118 (emphasis added).

154. Measure 37, *supra* note 1, at § (8).

155. *Id.* § (8), (10). Measure 7 had no express provision allowing government to waive land use restrictions instead of compensating landowners. *See* League of Or. Cities v. Oregon, 56 P.3d 892 (Or. 2002); *see also* Barnard, *supra* note 121 and accompanying text (discussing lack of a waiver provision in Measure 7); *see also supra* notes 118-20 and accompanying text.

156. Measure 37, *supra* note 1, at § (4), (10) (providing in § 10 that if a claimant does not receive compensation within two years of the date upon which her right to compensation accrued, she shall be entitled to use her property as permitted at the time she (or a family member) acquired it).

157. *Id.* § (4) (intending to provide time for the governing body to evaluate the claim, hold public hearings, and decide upon an appropriate course of action); *see also* Hunnicutt, *supra* note 36, at 43.

where the property is located.[158] The measure gives a claimant two years from the time an offending land use regulation is passed or is applied to her land to apply for compensation from the regulating entity.[159]

The right to compensation created by Measure 37 is extraordinarily broad. First, the measure requires compensation for any regulation that *in any way* diminishes the value of a particular property. On its face, no alleged diminution in value is too small to support a claim. Second, the measure has potentially far-reaching retroactive effect. A present landowner is potentially entitled to compensation for any regulation imposed upon her land after the time she *or a family member* acquired the property.[160] A landowner therefore may reach back generations to determine the date upon which she acquired her property for purposes of asserting a Measure 37 claim. This "inheritance right" could certainly reach back to a time prior to the enactment of Oregon's statewide comprehensive land use planning system, or indeed to any applicable zoning.[161] Third, the

158. Measure 37, *supra* note 1, at § (6) (explicitly providing that an applicant need only file a written application for payment with the relevant governing body and wait 180 days for her cause of action in circuit court to accrue). Although the governing body is free to enact procedures for processing Measure 37 claims, an applicant need not exhaust those procedures, other then by filing a written application for compensation, prior to seeking redress in the circuit courts. *Id.* § (7); *see also* Steven Amick, *Molalla Spells Out Approach to Measure 37*, OREGONIAN, Dec. 10, 2004, at B02 (discussing local Measure 37 ordinance); David R. Anderson, *Council Refines Measure 37 Process*, OREGONIAN, Nov. 24, 2004, at C01 (discussing local Measure 37, including criticism of an ordinance of the city of Beaverton by Measure 37 drafter, David Hunnicutt, because it set a fee of $1000 for filing Measure 37 claims, which he thought would simply lead claimants to take their claims to court rather than pursue them through the city's administrative process); Dennis McCarthy, *Happy Valley Sets Flat Fee for Measure* 37, OREGONIAN, Dec. 9, 2004, at D02 (discussing local Measure 37 ordinance); Edward J. Sullivan, *Year Zero: The Aftermath of Measure 37*, 36 ENVTL. L. 131, 143-44 (2006) (discussing § 7).

The measure also entitles a successful claimant to attorneys' fees reasonably incurred to collect compensation. Measure 37, *supra* note 1, at § (6).

159. Measure 37, *supra* note 1, at § (5) (setting a two-year statute of limitation for claims based on regulations existing prior to its enactment, but that time does not begin to run until the *later* of the date of Measure 37's passage, or the date a governing body applies the regulation as approval criteria to an application submitted by the owner of the property. Under this statute of limitation, Measure 37 claims are virtually immortal. For example, a property owner who purchased property in 2005, and who applies for the first time to subdivide her land in 2020, and is denied permission to do so based on a land use ordinance passed in 2006, preventing subdivision, would be entitled to compensation).

160. *Id.* § (3)(E) (exempting from compensation only those regulations "enacted prior to the date of acquisition of the property by the owner *or a family member of the owner* who owned the subject property prior to acquisition or inheritance by the owner, whichever occurred first."); *Id.* § (11)(A) (defining family member to "include the wife, husband, son, daughter, mother, father, brother, brother-in-law, sister, sister-in-law, son-in-law, daughter-in-law, mother-in-law, father-in-law, aunt, uncle, niece, nephew, stepparent, stepchild, grandparent, or grandchild of the owner of the property, an estate of any of the foregoing members, or a legal entity owned by any one or combination of these family members or the owner of the property."). Measure 37's definition of family member is far more expansive than, for instance, Oregon's intestacy statute, which does not include in-laws or step-children. *See* OR. REV. STAT. § 112.045 (2005) (establishing inheritance priorities of surviving family); *In re* Estate of Reinbrecht, 240 P. 223, 224 (Or. 1925) (stepchildren not included in inheritance of estate). For a discussion of Measure 37 § 3(E), *see infra* notes 388-400 and accompanying text.

161. A present landowner who bought the property from her stepfather, who had himself purchased it from his father-in-law would presumably be treated as having owned the property from the date her stepgrandfather-in-law purchased the property. *See* MacLaren, *supra* note 73, at 58-59

measure calculates the amount of compensation that is due in a highly speculative manner, which several commentators have criticized for potentially creating large windfall gains for individual claimants.[162]

Measure 37 exempts five categories of land use regulations from its compensation requirement.[163] First, land use regulations passed before the present owner, or her family, as defined in the measure, acquired the property are exempt from compensation.[164] Second, land use regulations "[r]estricting and prohibiting activities commonly and historically recognized as public nuisances under common law" are exempt.[165] The measure further directs that this exemption "shall be construed narrowly in favor of a finding of compensation under this act."[166] Third, land use regulations "[r]estricting or prohibiting activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations" are exempt from compensation.[167] Fourth, "to the extent land use regulation is required to comply with federal law," it is exempt.[168] Fifth, regulations "[r]estricting or prohibiting the use of the property for the purpose of selling pornography or performing nude dancing," are also exempt from compensation, provided that the provision is not "intended to affect or alter rights provided by the Oregon or United States Constitutions."[169] We consider each of these exemptions in section V below.

(noting the high number of potential compensation claims because of the measure's intergenerational reach).

162. Measure 37 entitles landowners to compensation of 100 percent of the reduction in the fair market value of the affected property interest resulting from the regulation as of the date of the owner's compensation demand. Measure 37, *supra* note 1, at § (2) ("Just compensation shall be equal to the reduction in the fair market value of the affected property interest resulting from enactment or enforcement of the land use regulation as of the date the owner makes written demand for compensation under this section."). In addition, the measure does not provide any source of funding from which the state or local governments might pay Measure 37 claims. *Id.*

Several commentators have complained about the difficulty of quantifying the effect of land use regulation on a parcel's value and have argued that the valuation is susceptible to windfall gains for claimants. *See* Sullivan, *supra* note 158, at 141-42 (discussing the practical difficulties of valuation, and noting the difference between a loss in value caused by land use regulation and a windfall gain that would obtain through a sudden waiver of land use regulation as to a claimant's parcel while still applying it to neighboring parcels; also citing other critics of the measure's valuation method); Lauren Sommers, Symposium, *Sustainable Land Use and Measure 37: A Practical Guide to Measure 37*, 20 J. ENVTL. L. & LITIG. 213, 226-28 (2005) (discussing debate over different valuation strategies); *see also* GEORGETOWN ENVIRONMENTAL LAW & POLICY INSTITUTE, *supra* note 22, at 1, 2, 35 (noting value created by tax and other incentives for restricted agricultural land; concluding that the establishment in Oregon of comprehensive land use regulation did not systematically devalue restricted parcels in the state).

163. Measure 37, *supra* note 1, at § (3). Each of these categories is discussed in further detail *infra* Section IV.

164. *Id.* § (3)(E).

165. *Id.* § (3)(A).

166. *Id.*

167. *Id.* § (3)(B).

168. *Id.* § (3)(C).

169. *Id.* § (3)(D).

C. Challenges to Measure 37

Adoption of Measure 37 prompted both court challenges and legislative reaction. In the courts, 1000 Friends of Oregon, several farm bureaus, and individual landowners challenged the measure facially on state and federal constitutional grounds.[170] In 2005, the legislature considered a number of bills, the most significant of which was Senate Bill 1037, which would have substantially amended and clarified the measure.[171] Ultimately, as discussed below, both the court challenge and the initial legislative attempts to amend Measure 37 failed.

1. The Oregon Circuit Court Decision

In January 2005, a group of individual landowners, farm bureaus, and 1000 Friends of Oregon challenged Measure 37 on state and federal constitutional grounds in the Marion County Circuit Court against the state Department of Administrative Services, LCDC, the state Department of Justice, Clackamas County, Marion County, and Washington County.[172] Several parties intervened in support of the state, including the chief Measure 37 petitioners, represented by Oregonians In Action.[173] In October 2005, the circuit court, per Judge Mary Mertens James, ruled in favor of the plaintiffs on grounds that Measure 37 (1) impermissibly intruded on the plenary power of the legislature;[174] (2) violated several

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170. *See generally* MacPherson v. Dep't of Admin. Serv., No. 05C10444 (Marion County Cir. Ct. Oct. 14, 2005), *available at* http://www.ojd.state.or.us/mar/documents/Measure37.pdf; MacPherson v. Dep't of Admin. Serv., 130 P.3d 308 (Or. 2006). Hector McPherson, the first individual named plaintiff in the challenge to Measure 37, was instrumental in the passage of S.B. 100. A dairy farmer turned state senator, McPherson introduced the bill in the Oregon Senate. *See* Sullivan, *supra* note 6, at 814-15 (discussing McPherson's central role in the passage of S.B. 100). McPherson framed land use planning in the language of individual rights—planning was needed to protect farmers' rights to farm their land, free from encroaching suburbanites' complaints that the smells and sounds of actual farming were incompatible with their enjoyment of a bucolic life outside the cities in which they worked. *See* Daniel Brook, *How the West Was Lost*, LEGAL AFFAIRS, Mar./Apr. 2005, *available at* http://www.legalaffairs.org/issues/March-April-2005/feature_brook_marapr05.msp (discussing McPherson's ability to frame land use planning in terms of personal rights and quoting him as saying, "There are all sorts of things that dairy farmers live with that city folks don't like, namely the odor from the cattle."). Ironically, some thirty years later, Measure 37's proponents would owe much of the success of their campaign to their ability to frame compensation for land use regulation in individual rights terms. *See id.* (discussing the individual rights theme sounded by Measure 37's media campaign).

171. S.B. 1037, 73d Legis. Assemb., Reg. Sess. (Or. 2005); H.B. 3474, 73d Legis. Assemb., Reg. Sess. (Or. 2005).

172. *MacPherson (No. 05C10444)*, at 1 (Marion County Cir. Ct. Oct. 14, 2005). As discussed below, the plaintiffs claimed Measure 37: (i) impermissibly impaired the legislature's plenary power; (ii) violated the Oregon Constitution's equal privileges and immunities clause; (iii) suspension of laws clause; (iv) sovereign immunity clause; (v) freedom of speech clause; (vi) compensation of religions clause; (vii) separation of powers clause; and (viii) violated the Federal Constitution's Fourteenth Amendment Due Process Clause. *Id.* at 10-22.

173. *See id.* at 1; Ballot Measure 37 Chief Petitioners' Voter Pamphlet Statements, http://www.measure37.com/why.htm (last visited Nov. 7, 2007).

174. *MacPherson (No. 05C10444)*, at 10-12 (concluding that Measure 37 impermissibly limited the plenary power of the Oregon legislature, citing the generic rule that a legislature's power to legislate is unfettered unless specifically constrained by the constitution, and determining that the Oregon Constitution contained no provisions permitting either the legislature or the initiative process

provisions of the Oregon Constitution,[175] including equal privileges and immunities,[176] suspension of laws,[177] and separation of powers;[178] and (3) violated both procedural[179] and substantive due process[180] under the Fourteenth Amendment of the U.S. Constitution.[181]

Perhaps the most interesting aspect of the circuit court's decision was Judge James's determination that Measure 37 violated the equal

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to limit the legislature's plenary power to regulate). The court concluded that Measure 37's requirement that the government pay landowners if it wanted to enforce valid, previously enacted, land use regulations amounted to an impermissible limitation of the legislature's plenary power, since the measure forced the government to "pay to govern." *Id.* at 11.

175. *Id.* at 13-16. However, Judge James rejected the plaintiffs' claim that Measure 37 violated the sovereign immunities clause of the Oregon Constitution by making the state liable for the economic consequences of regulation, as she concluded that the state's power to waive its sovereign immunity through legislation is broad enough under article IV, section 24 of the Oregon Constitution to encompass the waiver worked by Measure 37. *Id.* at 16-17. She also determined that that the Plaintiffs' state constitution freedom of speech claim was not justiciable because none of the plaintiffs asserted that they wished to use their property to allow nude dancing or sell pornography, so the provisions of Measure 37 exempting regulations restricting those activities from compensation were not implicated. *Id.* at 17. Even if she were to find that this clause of Measure 37 violated the free speech clause of the Oregon Constitution, Judge James concluded that the only available remedy would be to sever that clause, due to Measure 37's severability provision. *Id.* Finally, the court also concluded that the measure did not violate the compensation to religious institutions clause of the Oregon Constitution because the measure applied to religious institutions as property owners, not in their function as religious institutions. *Id.* at 18.

176. *Id.* at 13 (interpreting article 1, § 20 of the Oregon Constitution—which stipulates that "[n]o law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens"—and deciding Measure 37 irrationally distinguished between landowners who acquired their land prior to the enactment of a particular land use regulation (pre-owners), and landowners who acquired their land after its enactment (post-owners), entitling pre-owners, but not post-owners, to compensation for any diminution in the value of their land caused by a land use regulation). The court found that this disparate treatment of pre- and post-owners failed to survive even deferential, rational-basis review. *Id.*

177. *Id.* at 15 (interpreting article I, § 22 of the Oregon Constitution—which stipulates that "[t]he operation of the laws shall never be suspended, except by the Authority of the Legislative Assembly"—and reasoning that, although suspending a law by ballot initiative is not itself impermissible—because the authority of the legislative assembly encompasses citizen initiatives—laws may not be suspended in violation of other constitutional provisions). Since Measure 37 violated the equal privileges and immunities clause by irrationally suspending land use regulations for some property owners but not for others, the court concluded that it also violated the suspension of laws clause, and thus could not delegate that authority to local governments. *Id.* at 16.

178. *Id.* at 18-19 (determining that Measure 37 violated the separation of powers clause because the measure permitted the legislature to delegate to local governments powers that the legislature itself did not have, such as the power to: (1) limit its plenary power; (2) distinguish unequally between two classes in conferring benefits; and (3) suspend the laws).

179. *Id.* at 20 (concluding that Measure 37 violated procedural due process by failing to provide landowners affected by a neighbor's successful Measure 37 claim with a meaningful right to be heard in the process of considering a claim, since such a challenge would be heard only after the state made a determination, which was—according to the court—"too little, too late" because if the state granted a waiver, development of the neighbor's property could begin immediately, and the aggrieved owner would suffer irreparable harm).

180. *Id.* at 22 (deciding that Measure 37 violated affected landowners' substantive due process rights by arbitrarily depriving them of a property interest—which Judge James defined as the loss in value to their property if development is permitted on Measure 37 claimants' property neighboring theirs). Although the affected owners' right to maintain their property value was not a fundamental right requiring heightened judicial scrutiny, the court nonetheless concluded that, since the measure violated equal privileges and immunities, it served no legitimate state ends, thus failing even rational-basis review. *Id.*

181. U.S. CONST. amend. XIV.

privileges and immunities clause by affording disparate treatment to landowners acquiring land prior to enactment of a land use regulation (pre-owners) and those acquiring afterward (post-owners).[182] She thought that these disparities violated the equal privileges and immunities clause because Measure 37's ends were illegitimate and its means were irrational.[183] According to the court, the measure's purported end—compensating pre-owners for the reduction in the fair market value of their property due to regulation—was illegitimate because it impermissibly limited the legislature's plenary power.[184] Even if the measure's end of compensating landowners for devaluation due to land use regulations was legitimate, however, Judge James concluded that the manner in which the measure awarded compensation did not rationally relate to this end.[185] The court also rejected the state's argument that the distinction between pre- and post-owners was rational because it took into account the fact that post-owners had notice of existing land use restrictions on their land when they purchased it. Judge James considered the allegation that some post-owners received a discount on their property to be "tenuous at best," because, among other things, the distinction failed to account for those who were willing to pay more for the land precisely because it, and surrounding parcels, were subject to land use restrictions, and because the measure gave no relief to those whose land value would be adversely affected by the deregulation of neighboring land through Measure 37 waivers.[186]

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182. *MacPherson (No. 05C10444)*, at 13. The court decided that the pre and post owner categories were "true classes" for equal privileges and immunities clause analysis, since they were defined by characteristics that are shared and have significance apart from the challenged law, a conclusion with which the Oregon Supreme Court would disagree. *See infra* notes 193-97 and accompanying text.

183. *MacPherson (No. 05C10444)*, 13.

184. *Id.* at 11.

185. The court rejected the rationality of the compensation scheme outright, determining that "permitting pre-owners to recover based on what their properties are worth today, instead of at the time the land use regulations were enacted and the injury to the owners was thus incurred, has no rational relation to the aim of Measure 37 of compensating property owners for the reduced fair market value of their property interest." *Id.* at 14.

The court also concluded that the manner in which the measure disparately compensates differently situated pre-owners was irrational, since it compensates pre-owners who have owned their property for many years more lavishly than it does pre-owners who have owned for a shorter period of time, as the more recent pre-owner will likely have paid more for the property than the older pre-owner. The court thought this bore no rational relationship to the measure's purported ends. *Id.*

186. *Id.; see also* GEORGETOWN ENVTL. L. & POLY INST., *supra* note 22, at 1, 35 (concluding that the establishment in Oregon of urban growth boundaries, and the adoption of restrictions on development in rural areas, did not have a systematically negative influence on the market values of restricted parcels in the state); William K. Jaeger, *The Effects of Land-use Regulations on Property Values*, 36 ENVTL. L. 105, 115 (2006) (discussing empirical studies linking land use regulation to increased property values and explaining in economic terms how the effect of a land-use regulation on property values can be positive or negative, whereas removing a land-use regulation from just one property usually has a positive effect for that one property only).

2. The Oregon Supreme Court Decision

Both the plaintiffs and the defendants appealed the circuit court's order to the Oregon Supreme Court.[187] In a February 2006 decision, the court unanimously reversed the judgment of the circuit court, in a surprisingly unreflective opinion by Chief Justice Paul J. De Muniz.[188] The court concluded that Measure 37 violated no provisions of the Oregon or federal constitutions, and therefore reinstated the measure.[189]

Justice De Muniz first rejected the circuit court's conclusion that Measure 37 impermissibly impaired the legislature's plenary power, deciding that Measure 37 was an exercise, rather than a limitation, of that plenary power.[190] Whereas the circuit court thought that Measure 37 placed limits on the legislature's power to regulate, and that such action was impermissible because the constitution authorized no limitation of this plenary power, the supreme court interpreted the measure quite differently: under its reading, Measure 37 authorized state or local entities to decide, in accordance with the measure's provisions, whether to pay just compensation or to modify, remove, or not apply certain land use regulations, which was "an *exercise* of the plenary power, not a *limitation* on it."[191] The court concluded that nothing in the state or federal constitutions limited the legislature from exercising its power in this manner; thus, the measure was constitutional.[192]

Justice De Muniz rejected out of hand the circuit court's equal privileges and immunities analysis, maintaining that pre- and post-owners are not "true classes" for purposes of the clause because they do not share characteristics separate from those the challenged law creates.[193] According to the court, the protections afforded by the equal privileges and immunities clause are available only to "those individuals or groups whom the law classifies according to characteristics that exist apart from the enactment of that challenge."[194] Since the "distinction between pre-

187. Under Oregon's declaratory judgment statute, a judgment holding a ballot measure invalid is appealed directly to the Oregon Supreme Court. OR. REV. STAT. § 250.044(5) (2007); MacPherson v. Dep't of Admin. Serv., 130 P.3d 308, 311 n.3 (Or. 2006). The county defendants did not join the appeal. *Id.* at 312 n.4.

188. *MacPherson*, 130 P.3d 308.

189. *Id.* at 322.

190. *Id.* at 315. Justice De Muniz agreed with the lower court that the legislature, and the people through the initiative process, share the exercise of legislative power, and that power is unfettered unless expressly or implicitly limited by the constitution. *Id.* at 314.

191. *Id.* at 315.

192. *Id.* By defining the measure as an exercise of plenary power, the Oregon Supreme Court essentially concluded that a legislature's plenary power includes the power to impose limits on its ability to control land use to the full extent constitutionally permissible. *See id.* The court also rejected, without analysis, the Plaintiffs' argument that Measure 37 constituted an impermissible contracting away of legislative power. *Id.* at 315 n.8.

193. *Id.* at 316.

194. *Id.* This is so because "every law itself can be said to 'classify' what it covers [as distinct] from what it excludes." *Id.* (quoting State v. Clark, 630 P.2d 810, 816 (Or. 1981)). The Oregon Supreme Court cited a number of its precedents that have rejected equal privileges and immunities

owners and postowners . . . is significant only by virtue of Measure 37 itself . . . the date that an owner acquired property has no significance apart from Measure 37."[195] Measure 37 thus did not classify landowners according to characteristics that existed apart from those it created, so the distinctions that the law itself created were not proper classes for purposes of the equal privileges and immunities clause.[196] With this legal legerdemain, Justice De Muniz concluded that Measure 37 did not violate equal privileges and immunities.[197]

The supreme court also rejected the circuit court's conclusion that Measure 37 worked as a suspension of laws.[198] Relying on the understanding of the word "suspension" contemporaneous with the adoption of the suspension clause in the Oregon Constitution, the court opined that Measure 37 did not "'cause to cease for a time,' 'delay' or 'interrupt' any land use regulation."[199] Instead, the measure's authorization to governing bodies to grant waivers of land use regulations under certain conditions simply effectuated "an amendment of the land use regulations in those particulars."[200] Justice De Muniz then pronounced that "no laws

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challenges to laws that themselves created the classification. One case rejected a challenge to an Oregon statute capping non-economic damages in wrongful death actions at $500,000 because "the challenged law itself created the distinction between persons who could receive more than $500,000 and persons who could not," and the equal privileges and immunities clause did not bar the legislature from making such distinctions. *Id.* (citing Greist v. Phillips, 906 P.2d 789 (Or. 1995)). Similarly, a challenge to the Oregon Tort Claims Act failed because "the alleged disfavored class (victims of government torts) existed as a class only by virtue of the statutory scheme." *Id.* (citing Hale v. Port of Portland, 783 P.2d 506 (Or. 1989), *overruled in part on other grounds by* Smothers v. Gresham Transfer, Inc., 23 P.3d 333 (Or. 2001)). Ultimately, the court noted that if the equal privileges and immunities clause were to reach as far as the circuit court decision suggested, laws conferring benefits to Gulf War veterans, for instance, would be subject to challenge by those non-veterans whom the law disfavors. *Smothers*, 23 P.3d at 317. The court thought this to be a nonsensical result. *Id.*

195. *Id.* The court also rejected the plaintiffs' argument that, even if the class of landowners was not a class independent of Measure 37, the measure still violated the equal privileges and immunities clause because it created a closed or fixed class, pre-owners, who received benefits over all others. Relying on precedent in which the court stated that laws allowing individuals to bring themselves within a favored class do not violate the equal privileges and immunities clause, plaintiffs had argued that the converse must also be true: laws that did not allow for such movement violated the clause. *See id.* at 316. However, the court rejected this argument on the basis that it had previously upheld closed classes as constitutional and claimed that plaintiffs' argument proved too much—otherwise, the legislature could not establish benefits for, say, veterans of specific wars because nonbeneficiaries were precluded from joining that class. *Id.* at 316-17.

196. *Id.*

197. *Id.* The court's reasoning could produce some absurd conclusions. For instance, this test would uphold against an equal privileges and immunities challenge, a law that prohibits women over 30 from drinking from public water fountains. The characteristic—age—used to distinguish the groups has no significance but for that imbued in it by the statute. Under the court's reasoning, the classes at issue—women over or under 30—are a creation of the statute itself, have no significance outside the statute, and thus are not a "true class" for equal privileges and immunities purposes. *See id.* at 316.

198. *Id.* at 317.

199. *Id.*

200. *Id.*

are 'suspended;' all laws not amended remain in effect," on the theory that an "amendment" does not amount to a "suspension."[201]

The court found no separation of powers problems with Measure 37, rejecting the circuit court's determination that the measure permitted the legislature to delegate to local governments powers that the legislature itself did not possess.[202] Since the court had determined that Measure 37 did not violate the equal privileges and immunities and the suspension of the laws clauses, it also concluded that powers delegated by the measure were powers the legislature possessed.[203]

The supreme court also reversed the circuit court's conclusion that Measure 37 violated the federal Constitution's procedural due process requirements.[204] Without deciding whether due process required pre-deprivation hearings for landowners adversely affected by Measure 37 regulatory waivers,[205] the court concluded that there were circumstances in which Measure 37 could be applied constitutionally, and that the plaintiffs had thus failed to meet their burden on a facial challenge.[206] The court noted that the measure did not prevent pre-deprivation hearings and explicitly authorized local governments to establish procedures to administer the measure.[207]

Finally, the supreme court rejected the lower court's conclusion that Measure 37 violated substantive due process, basing its analysis on its

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201. *Id.*

202. *Id.* at 318-19.

203. *Id.* at 318. Justice De Muniz also rejected the Plaintiffs' argument that Measure 37 intruded on the executive power by delegating the enforcement of land use regulations, an executive authority, to legislative bodies, concluding that the waiver of land use regulations was not always an executive action and that, even if it were, Measure 37 vested the power to waive land use laws, in some instances, with the LCDC, an executive agency, and in other instances, with local governments, which are empowered to exercise both executive and legislative functions. *Id.* at 318-19. In addition, the court rejected the Plaintiffs' argument that Measure 37 failed to provide adequate safeguards to prevent improper use of the power conferred to local governments, concluding that the measure's grant of a cause of action to claimants seeking compensation was an adequate safeguard against the arbitrary exercise of power by the implementing body. *Id.* at 319.

Like the circuit court, the Oregon Supreme Court rejected the plaintiffs' argument that because Measure 37 made the state liable for purely consequential economic harm caused by past or prospective legislation, it was an improper waiver of state sovereign immunity. *Id.* at 320 ("Nothing in Article IV, section 24, or, so far as we are aware, in any other state constitutional provision, forbids the state from deciding that it will compensate property owners for the economic consequences of the state's land use regulations, including waiving the state's sovereign immunity to permit those owners to assert their claims in court.")

204. *Id.* at 321.

205. The circuit court had concluded that the measure's failure to provide pre-deprivation hearings for neighboring landowners adversely affected by the government's grant of a waiver under the measure to a nearby landowner violated procedural due process. MacPherson v. Dep't of Admin. Serv., No. 05C104444, at 21 (Marion County Cir. Ct. Oct. 14 2005); *see also supra* note 179.

206. *MacPherson*, 130 P.3d at 321. Because Plaintiffs were facially challenging Measure 37, they bore the burden of showing that the measure could not be constitutionally applied under any circumstances. *Id.* (citing United States v. Salerno, 481 U.S. 739, 745 (1987)).

207. *Id.* The court seemed to leave open the possibility of an as-applied substantive due process challenge by a proximate landowner, where a local government adopted an ordinance that did not provide the proximate landowner with a hearing prior to the grant of a Measure 37 waiver.

earlier conclusion that Measure 37 violated no other provisions of the state constitution; thus, the circuit court's premise in deciding that the measure violated substantive due process was erroneous.[208] Justice De Muniz also found no merit in the plaintiffs' argument that Measure 37 violated substantive due process by furthering only a private interest—that of the Measure 37 claimant—instead of a government interest.[209] The plaintiffs argued that since Measure 37 granted individuals compensation for economic effects of a regulation that did not amount to a Fifth Amendment taking, the measure amounted a kind of "reverse extortion."[210] Justice De Muniz rejected that argument on the ground that, although neither the state nor the federal constitution requires compensation of land use regulations that fall short of takings, neither do they forbid such compensation. Applying the same rational basis review as the circuit court, Justice De Muniz concluded that compensating landowners for losses in property value as a consequence of land use regulation is not irrational.[211] Further, he thought that the means employed by Measure 37 were reasonably related to those rational policy objectives, and thus the measure did not violate substantive due process.[212]

3. Legislative Amendments

During the 2005 legislative session, both houses of the legislature introduced bills designed to clarify and amend Measure 37.[213] The most significant of these proposals was S.B. 1037, the product of months of deliberation within the Senate land-use committee.[214] S.B. 1037, as amended by the House of Representatives, eventually passed in the Re-

208. *Id.*
209. *Id.* at 321-22.
210. *Id.* at 322.
211. *Id.*
212. *Id.*
213. In addition to S.B. 1037, 73d Legis. Assemb., Reg. Sess. (Or. 2005), discussed below, the legislature introduced bills outlining the procedures to be followed by local governments processing Measure 37 claims. *See* H.B. 3246, 73rd Legis. Assemb., Reg. Sess. (Or. 2005); H.B. 3247, 73rd Legis. Assemb., Reg. Sess. (Or. 2005) (setting forth application requirements); H.B. 3249, 73rd Legis. Assemb., Reg. Sess. (Or. 2005) (requiring local governments to hold public hearings when deciding claims) (allowing local governments to deny a Measure 37 claim where the value lost by the claimant due to the application of a land use rule is less than the value that would be lost by neighbors if that land use rule was waived with respect to the claimant); H.B. 3130, 73rd Legis. Assemb., Reg. Sess. (Or. 2005); H.B. 3285, 73rd Legis. Assemb., Reg. Sess. (Or. 2005) (prohibiting property owners from suing local governments for losses incurred as a result of the government's waiver of the land use regulation (ie., H.B. 3120, 73rd Legis. Assemb., Reg. Sess. (Or. 2005)).

One early bill, S.B. 406, 73rd Legis. Assemb., Reg. Sess. (Or. 2005), would have significantly reworked Measure 37 by providing only prospective, but not retrospective, relief to property owners and would have required a land use rule to diminish property value by at least 25 percent (or a combination of land use rules to diminish value by 45 percent) before a compensation claim could accrue. S.B. 406, 73rd Legis. Assemb., Reg. Sess. § 2 (Or. 2005). The bill would have established detailed procedures for processing claims, including various means of funding compensation payments such as through tax relief and the sale of government bonds, and would have established a framework for transferable development credits. S.B. 406 §§ 5, 18.

None of these proposals took flight, however, and each remained in its respective land use committee upon the adjournment of the 2005 legislative session.

214. *See* Laura Oppenheimer, *Mild Measure 37 Bill Passes*, OREGONIAN, Jul. 8, 2005, at C01.

publican-controlled House but failed in the Democratic-controlled Senate.[215] S.B. 1037 would have established uniform application and judicial appeals procedures for Measure 37 claims[216] and clarified which governing bodies had the authority to waive land use rules in response to Measure 37 claims.[217]

S.B. 1037 also would have allowed Measure 37 claimants who obtained waivers of land use rules to transfer those waivers with their property when they sold it.[218] The waiver transfer provision deeply polarized the legislature and accounted for the party-line voting that ultimately defeated the bill.[219] Although the 2005 legislature failed to pass legislation clarifying Measure 37, it did pass S.B. 82, which created a ten-member task force charged with evaluating Oregon's land use planning system and issuing an initial report (referred to as the "Big Look") to the legislature in 2007 and a final report in 2009.[220]

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215. S.B. 1037, 73rd Legis. Assemb., Reg. Sess. (Or. 2005); Laura Oppenheimer & Michelle Cole, *Political Notebook: Senate Rejects Effort to Revise Measure 37*, OREGONIAN, Aug. 4, 2005, at D04.

216. *See* C-Engrossed S.B. 1037, 73rd Legis. Assemb., Reg. Sess. § 2 (Or. 2005) (claims procedure section).

217. *See* C-Engrossed S.B. 1037, 73rd Legis. Assemb., Reg. Sess. § 1.8. The bill authorized state agencies to grant waivers for claims based on state statutes administered by the particular state agency and the Oregon Department of Administrative Services to grant waivers for claims based on all other statutes not administered by a state agency. *Id.*

Earlier versions of the bill included some noteworthy provisions. One provision would have required claimants who received permission to develop their land to reimburse the government for certain tax breaks they had received in the past for maintaining their property as forest, farming or agricultural land. *See* A-Engrossed S.B. 1037, 73rd Legis. Assemb., Reg. Sess. § 28 (Or. 2005). These back-tax assessments could have provided funding enabling local governments to compensate claimants, rather then waive the land use regulations at issue. Earlier versions of the bill also included provisions that would have specified land use rules exempt from Measure 37 claims. *See* As-introduced S.B. 1037, 73rd Legis. Assemb., Reg. Sess. § 3 (Or. 2005) (referring to specific provisions of the land use statutes to which Measure 37 did not apply); Laura Oppenheimer, *Blueprint Drawn for Land-Use Overhaul*, OREGONIAN, May 11, 2005, at A01 (describing original S.B. 1037 proposal).

218. C-Engrossed S.B. 1037, 73rd Legis. Assemb., Reg. Sess. § 2.12 (Or. 2005) (waivers granted pursuant to Measure 37 "(a) are uses allowed outright; (b) run with the land; and (c) may be transferred freely by the owner to the owner's successors in interest"). Earlier versions of the bill provided that if successful claimants or their successors in interest did not act pursuant to the waiver within ten years after it was granted, the waiver expired. *See* A-Engrossed S.B. 1037, 73rd Legis. Assemb., Reg. Sess. § 6.12 (Or. 2005) ("[I]f a public entity decides to waive one or more land use regulations in lieu of paying compensation, the waiver expires 10 years after the date of the final decision, unless the proposed use identified in the demand is substantially implemented within the 10-year period.").

219. *See* Oppenheimer, *supra* note 215, at D04 (noting that the vote on S.B. 1037 fell along party lines, with Republicans voting for, and Democrats voting against, and citing Democrats as saying that the bill's mechanical improvements to the Measure 37 claims process were not worth opening the door to widespread development); Laura Oppenheimer, *Property Rights Compromise Bill is Expected to Die in the State Senate*, OREGONIAN, Aug. 3, 2005, at B09 (stating that "ayes and nays rode largely on one provision: allowing successful claimants to pass on new building opportunities for as long as 10 years when they sell their land."); Laura Oppenheimer, *Kulongoski Deals on Property Rights*, OREGONIAN, July 30, 2005, at D01 (discussing the polarized fighting over the issue of allowing building opportunities to be transferred without also limiting the scope of construction or creating a way to compensate adversely affected property owners).

220. S.B. 82, 73rd Legis, Assemb., Reg. Sess. (Or. 2005); *see also* Press Release, State of Oregon Governor's Office, State Appoints Oregon Task Force on Land Use Planning (Jan. 26,

More substantive legislative amendments occurred in the 2007 legislature. One measure extended the time during which governments must process Measure 37 claims.[221] Another referred a comprehensive set of amendments to the Oregon voters that would offer greater certainty to claimants while imposing limits on the number of claims.[222] These developments are discussed in section VI.

III. INTERPRETING AND IMPLEMENTING MEASURE 37

Because the 2005 legislature was unable to pass legislation addressing the many questions raised by the measure, and because court challenges delayed its implementation, Measure 37's scope remains largely undefined.[223] Oregon courts and the state Attorney General have addressed some questions, such as the transferability of waivers granted pursuant to the measure. However, these and many other issues have not yet been fully resolved. This section addresses questions surrounding the interpretation and implementation of the measure, focusing on (1) the scope of the measure, (2) how to value claims under the measure, and (3) the nature, transferability, and source of land use waivers granted under the measure.

A. The Scope of the Measure

Measure 37 creates a radically far-reaching right to compensation, subject to potentially broad exceptions.[224] At its core, the measure promises compensation for any land use regulation passed after a landowner, or a member of the landowner's family, acquires property that in *any way* diminishes the value of the property.[225] This right to compensation is broader than that in any other state, except Arizona, that has adopted a statute compensating landowners who suffer financial losses due to land use regulation.[226]

2006), http://www.oregon.gov/LCD/docs/30_year_review/land_use_task_force_ press_release_ 012606.pdf (describing members jointly appointed to the task force by the Governor, Senate President and Speaker of the House). *See generally* MacLaren, *supra* note 161, at 64-65, 76-77 (lamenting the lack of funding for the task force and recommending how task force should focus its assessment of the land use system).

221. *See infra* notes 460-65 and accompanying text.

222. *See infra* notes 468-94 and accompanying text.

223. Unlike the 2005 legislative session, in which the House was controlled by Republicans and the Senate and Governorship by Democrats, the 2007 Senate, House and Governorship were all Democratic controlled. The 2007 legislature's attempts to address Measure 37 are addressed *infra* Part VI.

224. Measure 37's exceptions are discussed *infra* Part IV.

225. Measure 37, *supra* note 1, at § 1.

226. Louisiana, Mississippi, Texas, Arizona and Florida have adopted landowner compensation laws—Mississippi in 1994, Louisiana, Texas and Florida in 1995, and Arizona in 2006. The Louisiana and Mississippi compensation laws apply only to regulations of agricultural and forest land and were passed to protect farming and forestry. *See* MISSISSIPPI PRACTICE ENCYCLOPEDIA § 63:43 (noting that the purpose of the Mississippi legislation was to protect landowners from government regulation impeding their ability to forest and farm). In Louisiana, the government must compensate landowners if the loss in property value due to regulation is 20 percent or more. LA. REV. STAT.

Measure 37 is not simply prospective—it compensates owners for regulations passed prior to the effective date of the measure but after the owner, or a member of her family, acquired her property.[227] This retroactivity is also far out of line with other states' compensation provisions.[228] Although Measure 37 promises to grant landowners an expansive new property right, its language is rife with ambiguity, and the land use laws expressly exempted from its compensation requirement are potentially far-reaching. Ultimately, the scope of the measure will hinge on how courts and the legislature interpret or amend these ambiguities, and how expansively they read its exceptions.

B. Measure 37's Ambiguous Compensation Provisions

Measure 37 provides little guidance as to how state and local governments are to implement its compensation mandate. In Oregon, the state, through LCDC, promulgates land use goals.[229] Local governments implement and enforce these goals by adopting comprehensive land use plans and ordinances in conformance with the statewide goals.[230] Under this system, many local land use limitations are the result of state statutes and regulations; in many cases, local governments are merely enforcing state requirements.[231]

ANN. §§ 3:3602(11), 3:3610, 3:3622(6), 3:3623 (2007). In Mississippi, government must compensate for a 40 percent or greater loss of value. *See* MISS. CODE ANN. §§ 49-33-3, 49-33-13 (2007). Texas requires compensation for regulations that devalue land by 25 percent or more, generally does not apply to municipal actions, and excludes a number of government actions, including actions taken to fulfill obligations mandated by state or federal law and actions taken to protect public health and safety. TEX. GOV'T CODE ANN. §§ 2007.002(5), 2007.003; 2007.022-024 (2007); *see also* McMillan v. Northwest Harris County Mun. Utility Dist. No. 24, 988 S.W.2d 337, 339-42 (Tex. App. 1999) (interpreting the compensation exception for government actions mandated by state law). Florida's law compensates landowners when a land use regulation "inordinately burden[s] an existing use of real property." FLA. STAT. ANN. § 70.001(2) (2007). Only Arizona's newly adopted ballot measure, Proposition 207, mirrors Measure 37 in compensating landowners for *any* reduction in property value due to regulation without a minimum threshold. *See* Ariz. Prop. 207 § 12-1134 (Ariz. 2006). *See generally* George Charles Homsy, *The Land Use Planning Impacts of Moving "Partial Takings" from Political Theory to Legal Reality*, 37 URB. LAW. 269, 278-81, 285-97 (2005) (discussing state compensation laws generally, focusing specifically on the effects of Florida's law).

227. *See* Measure 37, *supra* note 1, § 3(E); *supra* note 160.

228. For example, both Arizona's Proposition 207 and Florida's compensation law expressly exclude land use laws enacted prior to the adoption of those measures. Prop. 207 § 12-1134(B)(7) (Az. 2006); FLA. STAT. ANN. § 70.001(12) (West 2007). The compensation laws of Texas, Louisiana and Mississippi have no such exclusion, and may apply retroactively when a government body enforces previously unenforced law enacted prior to the measure. *See, e.g.*, TEX. GOV'T CODE ANN. §§ 2007.003(a)(4) (Vernon 2007) (providing that the compensation statute is triggered by enforcement of regulations). None of these statutes, however, back-dates a landowner's acquisition of her property to the time when a family member acquired the parcel. Unlike Measure 37, then, these states' provisions do not appear to require compensation for laws passed generations before the present landowner acquired her property.

229. *See generally supra* notes 32-52 and accompanying text (describing structure of Oregon land use system).

230. *See, e.g.*, OR. REV. STAT. § 197.646 (2005) (requiring local government to amend its comprehensive plan and land use regulations to implement new land use statutes and LCDC land use goals and rules).

231. *See supra* notes 32-52 and accompanying text.

In the face of this multi-tiered system, Measure 37 leaves ambiguous just which entity must compensate landowners for land use regulations that devalue their property. Section 1 of the measure provides that "a public entity that enacts or enforces" a land use regulation that reduces land value must compensate landowners for the reduction in the value of their land.[232] This language implies that claimants can seek compensation from *either* the government entity enforcing the measure *or* the government entity enacting the measure. In many instances, then, an aggrieved landowner may be entitled to compensation from either the state, which enacted the requirement, or the local government, which enforced it.[233]

How to administer a system in which claimants can seek compensation for the same regulation from either the state *or* the local government has led to vigorous debate but no clear answers. Oregonians In Action, for instance, recommends that Measure 37 claimants, "to be safe," file their claims with both the local government responsible for enacting or enforcing the land use regulation and the state because "most county land use regulations are the result of statutes and administrative rules passed by the state legislature and state agencies."[234] The state, on the other hand, maintains that the entity enforcing the land use regulation (usually the local government) is liable for any compensation payments, and that enforcement of a land use regulation by a local government, even if that regulation is one enacted by the state rather than the local government, does not give rise to state liability for compensation.[235] In the failed S.B.

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232. Measure 37, *supra* note 1, at § 1.

233. According to Oregonians In Action, for example,

> [I]t is not always clear who is responsible for the land use regulations that have taken away your property rights. Sometimes the local government is enforcing its own law that is not required by the state. Sometimes the local government has adopted an ordinance because it was ordered to do so by the state. Sometime both state and local government laws operate independently of each other, and both reduce the use and enjoyment of your property.

Oregonians In Action, Ballot Measure 37, Frequently Asked Questions, http://measure37.com/faq.htm (last visited Nov. 7, 2007).

234. *Id.* Implied in this recommendation is the position that both state and local governments may be liable to pay compensation for laws they enact and for laws they simply enforce and, presumably, for laws enacted by the state and enforced by the local government. Ultimately, Oregonians In Actions' point is that some entity is liable, so claimants should make their compensation applications to all that might possible be involved in the land use regulation for which they seek compensation. It is then the government's task to sort out which entity must pay. *See id.*

235. According to the state, "[g]enerally, the public entity enforcing the law is responsible for paying compensation regardless of whether the law is state or local." Governor Theodore R. Kulongoski, 2004 Oregon Ballot Measure 37, Initial Questions and Answers 2 (2005), *available at* http://www.oregon.gov/LCD/docs/measure37/m37qanda.pdf. Where a local government enforces a state law enacted prior to the effective date of Measure 37 (December 2, 2004), the local government has no right of indemnity from the state for any Measure 37 liability it incurs. *Id.* While the same is true when a local government enforces a state law passed after the effective date of Measure 37, Article XI, § 15 of the Oregon Constitution, which obligates the state government to compensate local governments for the costs of implementing programs the state imposes upon them, may require to the state to indemnify local governments for usual and reasonable costs of enforcing newly promulgated state land use laws. *Id.*

1037, the 2005 legislature attempted to address which government entities were empowered to grant land use waivers, but it steered clear of defining which entity was responsible for paying compensation for particular land use regulations.[236]

In addition to its ambiguity about which entity has jurisdiction to grant compensation or waivers, Measure 37 provides no instruction as to how government bodies are to calculate the diminishment in property value caused by a land use regulation. Section 2 of the measure defines the "just compensation" due a landowner as that which is "equal to the reduction in the fair market value of the affected property interest resulting from the enactment or enforcement of the land use regulation as of the date the owner makes written demand for compensation." [237] Of course, there are many possible ways to measure a reduction in fair market value;[238] however, neither the courts nor the legislature has addressed

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The state also contends that enforcement of state statutes by local governments triggers no Measure 37 liability for the state. *Id.* The state reaches this conclusion by interpreting § 1 of Measure 37, which provides that relief is available when a "public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to the effective date" of Measure 37. *Id.* For existing laws, only the public entity enforcing the regulation is liable under Measure 37, according to the state. For new laws, the state is liable only for the *enactment* of the law, not for its enforcement. Thus, local government *enforcement* of the law does not give rise to state liability, since all the state has done is *enact* the law, and enforcement and enactment are different, separately enumerated actions in Measure 37. *Id.* ("If the state enacted the new law, it may be liable for its act of having enacted the law, but not as a result of the action of the local government to enforce it.")

236. *See* S.B. 1037, 73d Leg. Assem., Reg. Sess. § 5.1 (Or. 2005). As described above at note 217, § 1.8 of the bill would have clarified which government entities could grant waivers. But the bill's only clue as to which entities were responsible for compensation payments was in section 5.1's instruction that claimants file compensation claims against the state with the Oregon Department of Administrative Services and claims against local government with the chief administrative officer of the local government. *Id.*

237. Measure 37, *supra* note 1, at § 2.

238. *See, e.g.*, Jaeger, *supra* note 186, at 126-27 (discussing valuation methodologies); Sommers, *supra* note 162, at 225-28.

One method of compensating landowners would be to pay them the difference between what their land is worth on the market without the land use regulation in question, and what the land is worth with the regulation still in place, measured at the time the landowner makes her Measure 37 claim. However, as William Jaeger points out, this method may create a windfall for the claimant by overvaluing the land at issue by including in the calculation the value created by one landowner's right to use her land in a manner unavailable to other landowners. According to Jaeger, "the reduction in market value resulting from a land-use regulation is a fundamentally different concept than the value of an individual exemption to the regulation," and any attempt at determining the true value of the former must correctly distinguish "the dollar amount attributable to the reduction in value for the land subject to the regulation . . . from the increase in value for non-regulated lands." Jaeger, *supra* note 186, at 121.

Another method of valuation would calculate compensation as the value lost at the time the land use regulation came into effect, and then provide a rate of return on that amount up to the date upon which the claimant made her Measure 37 claim. Memorandum from Timothy J. Sercombe on the Meaning of "Just Compensation" under ORS 197.352(2) and Modification to Robert E. Stacey, Jr. 18-19 (June 15, 2006) (on file with authors). Under this method, a landowner whose land was down-zoned in, say 1990, would be entitled to the difference between the fair market value of the land prior to the zoning change and the fair market value of the land after the zoning restriction, both measured at the time the land use regulation was passed, here 1990. That amount would then be multiplied by a reasonable rate of return, say five percent, up to the time at which the landowner made her Measure 37 claim, and the landowner would be due the aggregate of the return on investment and the amount of devaluation at the time the land use regulation was passed. *Id.*

the issue.[239] Finally, the measure creates no mechanism for funding the compensation payments it authorizes, effectively guaranteeing that the applicable government will choose to "modify, remove, or not to apply the land use regulation" in lieu of compensating a successful claimant.[240]

C. *Ambiguities in Measure 37's Waiver Provisions*

Unlike Measure 7, which did not include an express waiver provision, Measure 37 explicitly allows governments to waive offending land use laws in lieu of compensating claimants.[241] Measure 37's waiver[242] provision raises a host of uncertainties, most of them due to the measure's ambiguous language. An initial uncertainty concerns which entity has the authority to waive a land use regulation. As discussed above, section 1 of the measure requires any public entity that "*enacts or enforces*" a land use regulation to compensate the landowner for the diminishment in property value caused by the regulation.[243] In lieu of compensation, however, the measure allows the governing body to waive the regulation. Confusingly, this waiver option appears in two separate provisions of the measure, in both sections 8 and 10.[244] Section 8 states that the waiver must be obtained from the government body *enacting* the

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239. A recent study spotlights the complexity of and controversy surrounding determinations of whether, and how, land use restrictions influence property values. GEORGETOWN ENVTL. LAW & POLICY INST., *supra* note 22, at 1 ("[T]he establishment [in Oregon] of . . . urban growth boundar[ies], and the adoption of . . . restrictions on development in rural areas, [had no] systematic negative influence on the market values of restricted parcels [in the state].").

240. Measure 37, *supra* note 1, at § 8. Indeed, as of July 18, 2007 the press had only reported one instance in which government proposed compensating a Measure 37 claimant rather than waiving the land use regulation with respect to her property. *See* Matthew Preusch, *Prineville Offers Measure 37 Pay*, OREGONIAN, Oct. 26, 2006, at A01 (reporting that Prineville was the first city "to decide to pay cash to offset the devaluation of private property because of development restrictions" rather than waive the restrictions in response to a Measure 37 claim); *Measure 37*, OREGONIAN, Dec. 3, 2006, at A15 (noting that Prineville offer was "Oregon's only compensation offer" for a Measure 37 claim).

241. Measure 37, *supra* note 1, at §§ 8, 10. For a discussion of the uncertainty created by Measure 7's lack of a waiver provision, see *supra* notes 118-21 and accompanying text.

242. Oregonians In Action objects to the term "waiver" to describe Measure 37's provision allowing governments to "modify, remove, or not to apply a land use regulation." Measure 37, *supra* note 1, at § 8. In a question and answer publication on its website, the group stated that "government officials, government lawyers, and anti-property rights advocates immediately began using the term 'waiver,' as a derogatory reference to the action taken by the state or local government to restore [a landowner's] rights." Oregonians In Action, Ballot Measure 37 Frequently Asked Questions, Question No. 6, http://measure37.com/measure%2037/faq.htm#5 (last visited Nov. 8, 2007). The term has, however, gained common currency as a shorthand description of the non-compensation options under Measure 37.

243. Measure 37, *supra* note 1, at § 1.

244. *Id.* §§ 8, 10. Section 8 provides:

> [I]n lieu of payment of just compensation under this section, the governing body responsible for *enacting* the land use regulation may modify, remove, or not to [sic] apply the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property (emphasis added).

Id. § 8.

Section 10 provides: "Notwithstanding the availability of funds under this subsection, a metropolitan service district, city, county, or state agency shall have discretion to use available funds to pay claims or to modify, remove, or not apply a land use regulation . . . ." *Id.* § 10.

legislation or regulation, while section 10 provides that land use regulations can be waived by a list of specific government entities, some of which may simply *enforce* land use regulations enacted by other government entities, such as state agencies.[245]

The interaction between sections 8 and 10 is hardly clear. Do all government bodies responding to Measure 37 claims have the option to pay compensation or waive the regulation, as section 10 suggests? Or are there some government bodies (like those that enforce but did not enact the land use regulation in question) whose only option is to compensate claimants? Although some commentators have pointed to this potential ambiguity, neither the state nor the courts have addressed the issue.[246] Some local governments that have adopted ordinances creating procedures for processing Measure 37 claims have also tried to address potentially overlapping state and county enforcement or enactment of land use regulations, but the early results were haphazard.[247]

Perhaps the most pressing uncertainty surrounding Measure 37 waiver provisions is whether these waivers are transferable; that is,

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245. *Id.*

246. *See* Cook, *supra* note 36, at 263-64 (arguing that because it may allow enforcers of land use measures (local governments), rather than those government bodies which enacted them (state agencies), to waive land use regulations, Measure 37 disrupts the statewide planning system and "local governments are forced to illegally waive state laws"); Sommers, *supra* note 162, at 232-33 (describing murkiness of the measure's waiver provisions).

The state has not directly addressed the tension between sections 8 and 10. Instead, the state Attorney General's office has analyzed the two sections to determine whether waivers are transferable without expressing any apparent concern about the tension between the sections. *See* Letter Regarding Ballot Measure 37 from Stephanie Striffler, Special Counsel to the Attorney Gen., to Lane Shetterly, Or. Dep't of Land Conservation and Dev. (Feb. 24, 2005), *available at* http://www.oregon.gov/LCD/docs/measure37/m37dojadvice.pdf [hereinafter AG Letter] (discussing whether waivers granted pursuant to sections 8 and 10 are transferable and whether those sections permit "blanket" waivers).

247. *See, e.g.*, Yamhill County Oregon, Ordinance 749, § 6(1)(c) (Dec. 1, 2004) (providing that, where the county has decided to waive a challenged county land use regulation, but the use remains prohibited by a state land use regulation, the county will notify DLCD of its waiver decision and may not permit the waived use until DLCD notifies the Yamhill County Board of Commissioners that it concurs with the county's decision or fails to respond within 180 days); MULTNOMAH COUNTY, OR., CODE § 27.530(K) (2004) ("Waiver of a county land use regulation does not constitute a waiver of any corresponding state statutes.") and § 27.530(H)(g) ("The land use regulation in question is not an enactment of the county [and thus the Board can deny a claim]."); LINN COUNTY, CODE § 225.570(C) (2005) ("The County is not responsible for any law, rule, ordinance, resolution, goal or other enactment if the law, rule, ordinance, resolution, goal or other enactment was not enacted by the County."). *But see, e.g.*, LANE COUNTY, OR., CODE §§ 2.700-.770 (2004) (setting forth Measure 37 claim procedures without addressing potentially overlapping state and county land use regulations); COOS COUNTY, OR., CODE §§ 11.04.010-.080 (2005).

Section 7 of Measure 37 provides that, although a local government may enact administrative procedures for processing Measure 37 claims:

> in no event shall these procedures act as a prerequisite to the filing of a compensation claim [in state court] . . . nor shall the failure of an owner of property to file an application for a land use permit with the local government serve as grounds for dismissal, abatement, or delay of a compensation claim.

Measure 37, *supra* note 1, at § 7. This provision casts some doubt on the legal effect of local governments' ordinances. *See* Susan Marmaduke, *The Effect of Administrative Decisions on Claims for Compensation in Circuit Court Under Measure 37*, 20 J. ENVTL. L. & LITIG. 329, 334-38 (2005) (discussing issues raised by Measure 37 § 7).

whether they are personal to the claimant or run with the land and can be used by future purchasers of a successful Measure 37 claimant's property. Since much of a waiver's economic value inheres in the ability of a landowner to transfer the rights conferred by the waiver to a purchaser of her property (for example, a developer), this question has attracted considerable attention.[248] Aside from generating a lively debate among commentators and interest groups, however, only the Oregon State Attorney General and one circuit court have thus far addressed the issue.

1. The State Attorney General's Opinion

In February 2005, the state Attorney General's office addressed the transferability issue in an opinion letter to the Director of the DLCD.[249] The letter concluded that Measure 37 waivers are personal to the landowner to whom they are granted and cannot be transferred with the land.[250] The Attorney General reached this conclusion by analyzing the text of the measure as well as the voters' intent, as gleaned from the arguments in favor of the measure appearing in the voters' pamphlet, newspapers, and television adds.[251]

Sections 8 and 10 of the measure allow the government entity, in lieu of paying compensation, to (1) modify, (2) remove, or (3) not apply a land use regulation "to allow the owner to use the property for a use permitted at the time the owner acquired the property."[252] The Attorney General concluded that this language "only provides authority for a public entity to waive a law to the extent necessary to allow an otherwise prohibited use by the 'present' owner, i.e., the owner at the time the exemption is granted."[253] Under this interpretation, Measure 37 authorizes

248. *See, e.g.*, Jona Maukonen, *Transferring Measure 37 Waivers*, 36 ENVTL. L. 177, 184 (2006) (concluding that waivers are not transferable but suggesting that a landowner who obtains a Measure 37 waiver may gain a vested property right in the waiver, and thus be able to transfer it, if she meets Oregon's multi-factor test for determining vested property rights); Sommers, *supra* note 162, at 238-39 (discussing waiver transferability); Oregonians In Action, Ballot Measure 37 Frequently Asked Questions, Question No. 7, http://measure37.com/measure%2037/faq.htm#6 (last visited Nov. 8, 2007) (arguing that waivers are transferable); 1000 FRIENDS OF OR., MEASURE 37: SUMMARY AND QUESTIONS, Question No. 6 (2005) (arguing that waivers are not transferable).

249. AG Letter, *supra* note 246. The letter was a response to two questions posed by the DLCD director: (i) are Measure 37 waivers transferable?; and (ii) can a public entity grant "blanket" or categorical Measure 37 waivers, rather than granting them on a case-by-case basis? *Id.* at 1. The answer to the first question is discussed above. As to the second question, the Attorney General concluded that public entities may not waive land use laws on a "blanket" basis, but must respond to each Measure 37 claim individually, waiving land use regulations or paying compensation only if the claim meets the criteria under the measure. Local governments "may not decide in advance that all claims that involve a particular law, or that involve owners who acquired their property after a particular date, or some other subset of the potential universe of claimants, will be granted relief." *Id.* at 1, 7-8.

250. *Id.* at 7.

251. *Id.* at 2.

252. *Id.* at 3 (quoting Measure 37, *supra* note 1, at §§ 8, 10 (emphasis omitted)).

253. *Id.* at 4.

government entities to make exemptions that are only personal to the landowner to whom they were granted.[254]

The Attorney General reasoned that the plain meaning of the text was bolstered by its "immediate context"; namely, the types of non-monetary relief authorized by the measure.[255] The first two means of providing non-monetary relief to claimants—"modifying" or "removing" the regulation—could be accomplished by actions that were either personal to the current landowner or by actions that run with the land, and thus shed no light on the voters' intent.[256] But the third means of non-monetary relief—to "not apply" the regulation—did reflect the voters' intent, because, in the opinion of the Attorney General, it could be accomplished only by government actions that are personal to the owner.[257] The provision authorized government bodies to discontinue enforcing an existing regulation against a particular landowner, but the regulation would otherwise remain in force.[258] Thus, a decision by a government entity not to apply a law "would necessarily be personal to the owner submitting the claim," according to the Attorney General.[259]

The history of the measure supports the Attorney General's conclusion. In particular, the measure's chief petitioners submitted to the voters' pamphlet an argument in favor or Measure 37 that was consistent with the interpretation that waivers are not transferable.[260] The argument stated that if an owner entitled to Measure 37 compensation conveys her property, the transfer establishes a new date of acquisition for purposes of determining what laws give rise to a claim.[261] The Attorney General

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254. *Id.*

255. *Id.*

256. *Id.* According to the Attorney General, a land use regulation could be modified or removed in two ways. The normal way for a government body to modify a law would be to amend it; the normal way for it to remove a law would be to repeal it. A government body could "modify the law to provide that 'this law shall not affect the real property at 111 Maple Drive, Anytown, Oregon,'" thus making a modification that runs with the land. It could equally as well modify a law "to provide that 'this law shall not affect any real property at 111 Maple Drive, Anytown, Oregon that is owned by John Doe,'" thus making a modification that is personal to the owner. *Id.* (emphasis omitted). "The fact that either [option] is technically possible means that this context does not shed any light one way or the other on whether the voters intended non-monetary relief to be personal to the present owner or to run with the land." *Id.*

257. *Id.* at 4-5.

258. *Id.* at 5 (noting that, except for the particular Measure 37 claimant, the regulation would otherwise continue unaltered, and if the present owner conveys the property to a new owner the public entity would have no lawful basis for not enforcing it if the conditions that create the right to relief under Measure 37 ceased to exist (e.g. if the property were acquired by someone who was not entitled to an exemption in his own right)).

259. *Id.*

260. *See id.* at 6.

261. *See id.* at n.5. The Voters' Pamphlet argument in support of the measure to which the Attorney General referred was submitted by Dorothy English, Barbara Prete and Eugene Prete. The argument is somewhat less clear than the Attorney General made it out to be, and was actually intended to clarify the measure's definition of "owner" in order "to instruct and aid the Oregon courts in determining the legislative intent behind Ballot Measure 37." Voters' Pamphlet, *supra* note 146, at 113. The argument explained that, when an original owner transfers less than the entire interest in her property to another, she is still the "owner" for purposes of Measure 37, and her

thought that this was "a clear statement that the chief petitioners expected that the relief available under the measure depends on when the current owner acquired the property—that the relief is personal to the current owner."[262] It followed that if the current owner is eligible for relief, then sells the property, the new owner is eligible for relief only from laws adopted after she acquired the property.[263]

Based on this analysis of the text, context, and history of the measure, the Attorney General concluded that Measure 37 authorizes governmental bodies to waive land use laws only to allow the present owner to use the property in a manner permitted at the time the present owner acquired the property.[264] This waiver was not only the minimum that a government body was required to do to avoid compensating a landowner with a valid claim, but since there was no authority independent of Measure 37 authorizing government bodies to waive land use regulations, it was also the maximum it could do.[265]

2. The Crook County Circuit Court Decision

In August 2006, an Oregon trial court, the Crook County Circuit Court, addressed the transferability of Measure 37 waivers in the context of a special proceeding brought by Crook County under a statutory provision allowing a local government entity, such as a county governing body, to initiate a proceeding in circuit court to determine the legality of an enacted ordinance.[266] Crook County passed Ordinance 153, which provided in relevant part that a Measure 37 waiver "properly recorded in the deed records of the county survives the sale or transfer of a property to new ownership."[267] In its suit, the county asked the circuit court to

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acquisition date is the relevant date for purposes of determining what laws give rise to a Measure 37 claim. The relevant language provides:

> If the current owner sells an interest in her property, so long as the current owner still has a current possessory interest, or a reversionary interest in the property, the provisions of Ballot Measure 37 apply using the date the current owner acquired the property. Only if the current owner sells all of her interest in a piece of property does the date of acquisition change for purposes of determining what regulations are subject to Ballot Measure 37 protections.

Id.

262. AG letter, *supra* note 246, at 6.

263. *Id.*

264. *Id.* at 7.

265. *Id.* The Attorney General noted that where a local government has discretion in implementing a land use ordinance (that is, the ordinance is not required by state law or regulation), the local government might have the authority to waive the ordinance with respect to both present and future landowners. Where a local government adopts an ordinance to implement a requirement of state or federal law, however, Measure 37 only authorizes the government to waive the law with respect to the present owner of the property. *Id.*

266. Crook County v. All Electors, No. 05CV0015 (Crook County Cir. Ct.), at ¶ 2, *available at* http://www.doj.state.or.us/hot_topics/pdf/measure37/crook_co_decision.pdf [hereinafter Crook County (No. 05CV0015)]. The special proceeding statute is codified at OR. REV. STAT. ANN. §§ 33.710-.720 (West 2007)).

267. CROOK COUNTY, OR., ORDINANCE 153, § 12 (2004), *available at* http://co.crook.or.us/LinkClick.aspx?fileticket=FLtnKMfQUmc%3D&tabid=78&mid=552 (last visited Nov. 8, 2007).

determine the legality of the ordinance's transfer provision. The state intervened in the case, as did a landowner who had been granted a waiver under Measure 37 and who wanted to sell the land—along with the waiver—to a developer.[268] Both the successful Measure 37 claimant and Crook County argued that under the language of Ordinance 153, the landowner should be able to transfer his waiver to subsequent owners, while the state argued that Measure 37 allowed no such transferability and, to the extent the ordinance conflicted with the measure, it was preempted.[269]

The circuit court, per Judge George W. Neilson, sided with the state, concluding that the waiver transferability provision of Crook County's Ordinance 153 "can not operate concurrently with [Measure 37] and the related context of Oregon's planning and land use regulation structure."[270] Consequently, Measure 37 preempted the ordinance's waiver transfer provision.[271] In reaching this conclusion, Judge Neilson noted that the ordinance and Measure 37 seemed to facially conflict, so he set out to "discern the intent of the voters to clarify the relationship of the enactments."[272]

Analyzing Ordinance 153, Judge Neilson determined that it was "clear from the text and context of Ordinance 153 that the Crook County Court[273] intended to allow the land use regulation waivers granted in lieu of compensation to survive the sale or transfer of the subject property to any new owner if the sale or transfer is made after the 'waiver' is recorded."[274] Since the text of Measure 37 neither expressly prohibits nor permits the transfer of land use waivers,[275] Judge Neilson turned to the

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268. *See generally* Crook County (No. 05CV0015), *supra* note 266. OR. REV. STAT. § 33.720(2) provides that the entity initiating a proceeding under OR. REV. STAT. § 33.710 must publish notice of the proceeding. OR. REV. STAT. § 33.720(2) (2005). Any person interested in the matter may appear before the court and "contest the validity of the proceeding, or any of the acts or things therein enumerated." OR. REV. STAT. § 33.720(3). In addition, OR. REV. STAT. § 33.710(4) provides that the court cannot conduct a judicial examination or render a judgment under the statute absent a justiciable controversy. OR. REV. STAT. § 33.710(4) (2005).

A second landowner, whose Measure 37 claim had been denied by the county, also intervened. This landowner challenged the claims procedures established by Ordinance 153. The court deemed his claim not to be justiciable, however, because the county had adjudicated the landowner's claim despite his failure to fully comply with the claims process. Crook County (No. 05CV0015), *supra* note 266, at 5.

269. Crook County (No. 05CV0015), *supra* note 266, at 6.

270. *Id.* at 12 (referring to the statutory codification of Measure 37, OR. REV. STAT. § 197.352 (2006)).

271. *Id.*

272. *Id.* at 6.

273. The Crook County Court is the governing body of Crook County. *Id.* at 8.

274. *Id.*

275. *Id.* Judge Neilson drew support for this conclusion by noting that the measure "acknowledges land use regulations may continue to change and develop because the text distinguishes between land use regulations adopted prior to December 2, 2004 [the date Measure 37 became effective] and regulations adopted thereafter." *Id.* He also observed that the measure limits governing bodies' authority to grant waivers to the present owner, limits the extent of the waiver to those uses permitted when the owner acquired the property, and expressly bars claims based upon land use

measure's context. He emphasized that the measure, by its own terms, became a part of Oregon's comprehensive land use planning statute.[276] The primary benefit of Measure 37 waivers, according to Judge Neilson, is the landowner's opportunity to exercise land uses, even though those uses would have been prohibited under existing land use regulations.[277] But "while the waived owner's right to use the property is protected under [Measure 37], no statutory exception exists which would allow the owner to transfer all interest in the property and preserve for the new owner the right to use the property under the waiver."[278]

Judge Neilson proceeded to state, however, that Measure 37 did not repeal the historic doctrine that owners acquire a vested, and transferable, right to a permitted use if they make a substantial investment or engage in substantial effort in exercising that use.[279] He concluded that Measure 37 and "the historic doctrine of vested rights complement one another"; thus, "[t]he waived owner that exercises a permitted use and makes a substantial effort or substantial investment in the use may continue and convey the use to a new owner even though the land use regulations change."[280] But absent such a vesting, waivers were not transferable under Measure 37, which preempted the contradictory local ordinance.

By interpreting Measure 37 in the context of, rather than as a reaction to, Oregon's comprehensive land use system, the Crook County Circuit Court may signal a way in which other courts may interpret the measure's scope. Both the circuit court's decision and the Attorney General's opinion suggest that the reach of Measure 37 may be interpreted narrowly, relying on expressions of voter intent to integrate the measure into Oregon's land use planning system. Such a narrow, contextual interpretation of the measure is supported by well-established principles of statutory construction for citizen initiatives.[281] Courts are

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regulations enacted prior to the date the owner acquired the property, concluding that "voters intended the date of acquisition to be a significant date." *Id.* at 9.

Judge Neilson also found support for the notion that Measure 37 should be interpreted as part of the state's comprehensive land planning program in statements in the voter's pamphlet, citing an argument submitted by Dorothy English, Barbara Prete, and Eugene Prete that discussed the significant effects of a change in ownership on Measure 37 rights. He also found significant the two exceptions to the Measure 37's general rule that new owners of property acquire subject to land use restrictions in force on the date of acquisition: 1) if the seller "retains a possessory or reversionary interest in the property"; or 2) if the new owner "acquires the property from a family member." *Id.* at 10. In both cases, the date of ownership relates back to the prior owners. Judge Neilson thought these exceptions reinforced the importance of the date of acquisition of the property. *Id.*

276. *Id.* at 8.

277. *Id.* at 9.

278. *Id.* at 11.

279. *Id.*

280. *Id.* at 12.

281. *See* Strahan v. Fred Meyer, Inc., 11 P.3d 228, 241 (Or. 2000) (interpreting a statutory provision adopted through the initiative process by applying the same methodology that applies to the construction of a legislatively enacted statute). The court seeks to determine the intent of the voters who pass the measure. The best evidence of the voters' intent, and the first level of analysis, is the text of the provision itself. Roseburg Sch. Dist. v. City of Roseburg, 851 P.2d 595, 597 (Or.

on solid ground if they interpret Measure 37's ambiguities in a manner that least conflicts with provisions in Oregon's well-established land use system.

IV. EXCEPTIONS TO MEASURE 37'S COMPENSATION REQUIREMENT

Measure 37 expressly exempts five categories of land use restrictions from its compensation requirement: regulations that (1) restrict activities commonly and historically recognized as public nuisances under common law;[282] (2) restrict activities for the protection of public health and safety;[283] (3) are required to comply with federal law;[284] (4) restrict the use of property for the purpose of selling pornography or performing nude dancing;[285] or (5) are passed before the present owner or one of her family members, as the term is defined in the measure, acquired the property.[286] Except for the exception for land use regulations required to comply with federal law,[287] courts have yet to address these exceptions. The exceptions are potentially far-reaching, however, and could be interpreted to significantly limit the measure's scope. This section examines the meaning, scope, and implications of each.

A. The Public Nuisance Exception

Section 3(A) of Measure 37 exempts from compensation those land use regulations "[r]estricting or prohibiting activities commonly and historically recognized as public nuisances under common law."[288] This provision instructs that "[t]his subsection shall be construed narrowly in favor of a finding of compensation under this section."[289] No court has interpreted this exception, nor has the state Attorney General issued any guidance on the state's interpretation.[290]

1993). The meaning of an initiative's terms is a function of the context in which the measure's drafters used those words. Portland Gen. Elec. Co. v. Bureau of Labor and Indus., 859 P.2d 1143, 1145-46 (Or. 1993). If the meaning is not clear from the text, the next level of inquiry looks to the history of the provision, focusing on information available to the voters at the time the measure was adopted to determine what the voters understood the measure to mean, including the ballot title, explanatory statement and arguments for or against the measure, and contemporaneous news reports on the measure. Ecumenical Ministries v. Or. State Lottery Comm., 871 P.2d 106, 111 n.8 (Or. 1994); *Strahan*, 11 P.3d at 243.

282. Measure 37, *supra* note 1.

283. *Id.* § 3(B).

284. *Id.* § 3(C).

285. *Id.* § 3(D).

286. *Id.* § 3(E).

287. Columbia River Gorge Comm'n v. Hood River County, 153 P.3d 997, 998 (Or. Ct. App. 2007); *see infra* notes 355-64 and accompanying text.

288. Measure 37, *supra* note 1, at § 3(A).

289. *Id.*

290. The state Attorney General did issue an extensive opinion memorandum in 2001 interpreting the provisions of Measure 7. *See* Or. Op. Att'y. Gen. *supra* note 113. Like Measure 37, Measure 7 contained a negligence exception to its compensation requirement. Measure 7's exception was more broadly worded than that of Measure 37, as it excepted from compensation the "adoption or enforcement of historically and commonly recognized nuisance laws." *See* Measure 7, *supra* note 2. The Attorney General interpreted Measure 7's exception broadly to include "statutes, rules

In construing Measure 37 and its exceptions, Oregon courts will apply well-established rules of initiative construction to determine the voters' intent at the time the voters adopted the measure.[291] Courts look first to the text of the measure within its context, including its relation to other provisions of the same and related statutes, prior enactments and prior interpretations of those and related statutes, and the historical context of those enactments.[292] If the voters' intent is not clear from the text and context of a measure, courts next examine the ballot title, its explanatory statement, voters' pamphlet arguments, contemporaneous news reports, and other information available to voters at the time of the measure's adoption.[293] If these materials still do not reveal clear voter intent, courts interpret ambiguities by applying canons of interpretation, including the maxim that the language of a statute should be construed in a manner consistent with its assumed purposes.[294]

The text of the public nuisance exception, which excuses a government from compensating landowners for any devaluation to their land caused by laws that prohibit "activities commonly and historically recognized as public nuisances under common law," is quite ambiguous.[295] One ambiguity is that, while Measure 37 requires compensation for "land use regulation . . . that restricts the use of private real property or any interest therein,"[296] the right to commit a public nuisance does not inhere in the use of property.[297] Land use restrictions prohibiting common law public nuisances would not seem to implicate any interest protected by Measure 37, and thus the measure would not have to except them. It is not clear, then, what this exception adds.

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and local ordinances that restrict or prohibit uses of private real property that have historically and commonly been recognized as a nuisance by the judicial, legislative or quasi-legislative branches of government. This almost certainly includes state and local civil and criminal nuisance abatement laws." Or. Op. Att'y. Gen. *supra* note 113, at *13. This perhaps also includes "other longstanding restrictions and prohibitions or uses that operate to prevent or remedy harm or injury to public rights, health, safety or morals." *Id.* at *14. The narrower wording of Measure 37's exemption is likely a direct reaction to the Attorney General's broad interpretation of Measure 7's language.

291. Strahan v. Fred Meyer, Inc., 11 P.3d 228, 241 (Or. 2000); Ecumenical Ministries v. Or. State Lottery Comm., 871 P.2d 106, 111 (Or. 1994); Portland Gen. Elec. Co. v. Bureau of Labor and Indust., 859 P.2d 1143, 1145-46 (Or. 1993). Courts interpret initiatives in the same manner as they interpret statutes, except that, where it matters, voter intent substitutes for legislative intent. *Id.*; *see also* Crook County (No. 05CV0015), *supra* note 266, at 6-7 (describing canons of interpretation for voter initiatives).

292. Young v. State, 983 P.2d 1044, 1046 (Or. 1999); Roseburg Sch. Dist. v. City of Roseburg, 851 P.2d 595, 597 (Or. 1993); *Portland Gen. Elec. Co*, 859 P.2d at 1146.

293. *Ecumenical Ministries*, 871 P.2d at 110-11.

294. *Portland Gen. Elec. Co.*, 859 P.2d at 1146-47.

295. Measure 37, *supra* note 1, at § 3(A).

296. *Id.* § 1.

297. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 492 n.20 (1987) (stating that "no individual has a right to use his property so as to create a nuisance or otherwise harm others"); Smoikal v. Empire Lite-Rock, Inc., 547 P.2d 1363, 1365, 1368 (Or. 1976) (stating that "one cannot acquire a prescriptive right to maintain a public nuisance no matter how long it has continued," and finding that a rock-processing plant was liable to neighbors under a public nuisance theory for damage to their property caused by emissions emanating from the plant).

What is meant by the exception's reference to a public nuisance "under common law" is another ambiguity. Does the exception extend to public nuisance prohibitions created by statute, such as laws prohibiting the siting of a nuclear facility on a fault line,[298] or only to land use restrictions codifying historical common law public nuisances?[299] If the latter, government would potentially have to compensate landowners for any law seeking to abate a nuisance not previously recognized as a common law public nuisance, effectively freezing the law.[300]

What is meant by the phrase "commonly and historically recognized" is another ambiguity.[301] The Oregon Supreme Court has defined common law public nuisance as "an unreasonable interference with a right which is common to members of the public generally."[302] The court historically recognized a number of activities in which private property owners had no right to engage because they constituted public nuisances.[303] In 1905, the Oregon Supreme Court articulated the catego-

298. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992) (illustrating the evolution of common law nuisance with the example that no Fifth Amendment compensation would be due to "the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault").

299. Defining statutes that codify common law public nuisance can be difficult. One commentator noted, "the common law of nuisance has long given 'a fairly helpful clew' on the validity of statutory land-use restrictions that augment existing common law. The common law of nuisance has historically been consulted, however, 'not for the purpose of controlling' the question of validity, but only 'for the helpful aid of its analogies.'" John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1, 7 (1993) (citing Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926)).

300. Such a restriction of public nuisance law would have far-reaching effects, and would certainly be a radical departure from the manner in which current takings jurisprudence treats laws that impinge on property to abate nuisances. *See, e.g.*, *Lucas*, 505 U.S. at 1035 (Kennedy, J. concurring) (stating "the common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society"); Blumm & Ritchie, *supra* note 25, at 333-36 (discussing the development of categorical nuisance defense to takings claims after the U.S. Supreme Court's *Lucas v. S. C. Coastal Council* decision, noting the court's acknowledgment "that background principles nuisances have the potential to evolve beyond their present scope," stating that "because nuisance law is continually expanding, new knowledge concerning the value of particular resources may . . . [impose] liability for acts which have not historically been considered to be common law nuisances," and citing a number of courts that have held background principles nuisances to include non-common law nuisances); Humbach, *supra* note 299, at 7 (noting the "vital legislative function of modifying and supplementing the common law when the latter proves inadequate to meet changing needs"); *see also* DOUGLAS KENDALL ET AL., TAKINGS LITIGATION HANDBOOK: DEFENDING TAKINGS CHALLENGES TO LAND USE REGULATIONS 117, 127 (2000) (describing flexibility of the nuisance defense to takings claims).

301. Measure 37, *supra* note 1, at § 3(A).

302. *See, e.g.*, Raymond v. S. Pac. Co., 488 P.2d 460, 462-63 (Or. 1971) (citing RESTATEMENT (SECOND) OF TORTS: SCOPE AND ITRODUCTORY NOTE TO CH. 40, at 216-18 (1977)).

303. Oregon courts have identified a number of activities to constitute public nuisances. *See generally* Mark v. State Dep't of Fish and Wildlife, 974 P.2d 716 (Or. 1999) (public nudity); Frady v. Portland Gen. Elec., 637 P.2d 1345 (Or. 1981) (sound waves resulting from power generating activities); Smejkal v. Empire Lite-Rock, Inc., 547 P.2d 1363 (Or. 1976) (air pollution from rock-processing plant); Spencer Creek Pollution Control Assoc. v. Organic Fertilizer Co., 505 P.2d 919 (Or. 1973) (odors from feedlot); Bither v. Baker Rock Crushing Co., 438 P.2d 988 (Or. 1968) (air pollution from rock quarrying and crushing operations); State *ex rel.* State Sanitary Auth. v. Pac. Meat Co., 360 P.2d 634 (Or. 1961) (operation of meat packaging company); Wilson v. Parent, 365 P.2d 72 (Or. 1961) (shouting obscenities in the street); Keller v. Gibson Packaging Co., 257 P.2d 621 (Or. 1953) (operation of a rendering plant); Columbia River Fishermen's Protective Union v.

ries of public nuisance at common law to include acts that "outraged public decency and were against good morals," "injuriously affected the public health," or "disturbed or injured the public peace or morals."[304]

A number of Oregon statutes have also codified—and criminalized—certain common law public nuisances.[305] One such statute criminalized "any act which grossly injures the person or property of another, or which grossly disturbs the public peace or health, or which openly outrages the public decency and is injurious to public morals,"[306] language the Oregon Supreme Court has characterized as "essentially descriptive" of common law public nuisance.[307] Instead of attempting to distinguish between statutorily defined public nuisances and common law public nuisances, Oregon courts have looked to the latter to define the former.[308] The courts have also uniformly recognized the context-dependent nature of public nuisance, whether codified or not.[309] Just what Measure 37's

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City of St. Helens, 87 P.2d 195 (Or. 1939) (pollution of river which killed fish); Wilson v. City of Portland, 58 P.2d 257 (Or. 1936) (city dumping municipal garbage in a ravine).

304. State v. Nease, 80 P. 897, 898 (Or. 1905). The court stated in full:

> Certain acts were punishable as nuisances at common law because they outraged public decency and were against good morals, such as habitual, open, and notorious lewdness, roaming the streets naked, the indecent exposure of the person on a highway or in a public place, the exhibition of an unseemly or obscene sign or picture, and other similar matters. Other acts were likewise punishable because they injuriously affected the public health, such as maintaining slaughterhouses in a populous neighborhood, or the exposing for sale for human food of putrid or infected articles which were injurious to the health . . . and the like. Still others because they disturbed or injured the public peace or morals, by congregating large numbers of idle and dissolute persons in one place for vicious purposes . . . .

Id.

305. *See, e.g.*, ORE. COMPILED LAWS ANN. § 23-919 (codified, as amended, at OR. REV. STAT. § 167.105 (2005), *repealed by* 1971 Or. Laws 743, § 432) (keeping a bawdyhouse); ORE. COMPILED LAWS ANN. § 23-929 (codified, as amended, at OR. REV. STAT. § 167.110 (2005), *repealed by* 1971 Or. Laws 743, § 432) (keeping a gaming house); OR. STAT. § 24-142 (codified, as amended, at OR. REV. STAT. § 471.620 (2005)) (sale of alcohol without a license).

306. OR. REV. STAT. § 161.310 (2005), *repealed by* 1971 Or. Laws 743, § 432 (repealing OR. STAT. § 14-722 (1953)).

307. *Nease*, 80 P. at 898; *see also* State v. Franzone, 415 P.2d 16, 19 (Or. 1966) ("the nuisance statute, as this court has frequently said, was intended to cover offenses against the public peace, the public health, and the public morals not elsewhere made punishable by the criminal statutes and which were known at common law as indictable nuisances"). Courts have cited the statute in enjoining behavior ranging from operating a gambling house to engaging in lewd acts. *See Nease*, 80 P. at 897 (gambling house); *Franzone*, 415 P.2d at 16 (lewd behavior).

308. *See, e.g.*, Wilson v. Parent, 365 P.2d 72, 78-79 (Or. 1961) (upholding equitable relief enjoining defendant from obscene conduct relying on both common law nuisance and anti-obscenity statute and noting with approval that the lower court "looked to common law for a definition of the general words of the statute"). *But see* Bowden v. Davison, 289 P.2d 1100, 1111 (Or. 1955) (declaring horse-round-up statute invalid as applied to privately owned horses and stating that "[a] legislative declaration that a certain thing [here unbranded horses at large on public land] constitutes a public nuisance is not final. It has no power to declare that to be a public nuisance which in fact is not. What constitutes a public nuisance is a judicial question.").

309. *See, e.g.*, E. St. Johns Shingle Co. v. Portland, 246 P.2d 554, 561-62 (Or. 1952) (stating "[t]he law of nuisance affords no rigid rule to be applied in all instances") (citing Stevens v. Rockport Granite Co., 216 Mass. 486 (Mass. 1914)); Raymond v. S. Pac. Co., 488 P.2d 460, 462 (Or. 1971) (stating "there is general agreement that [the law of nuisance] is incapable of any exact or comprehensive definition") (citation omitted); *see also* Dep't of Envtl. Quality v. Chem. Waste Storage and Disposition, Inc., 528 P.2d 1076, 1081 (Or. App. 1974) (determining that, under the

reference to "common law nuisance" was meant to encompass, and whether and how it includes statutorily defined nuisances, is hardly clear from the text of the exception.

The context of the exception is similarly unhelpful in clarifying the voters' intent. By its terms, Measure 37 was meant to be, and has been, "added to and made a part of ORS chapter 197," Oregon's land use planning statute.[310] So Measure 37, as part of the land use planning statute, must be interpreted in the context of, and as consistently as possible with, that system.[311] This context arguably suggests that, to the extent land use laws aim to abate public nuisances, they must qualify for the section 3(A) exemption from compensation.

The history of the exception, however, casts some doubt on the contextual inference that land use laws abating public nuisances qualify for section 3(A)'s exemption. The most relevant evidence of voters' intent is an argument in support submitted by Measure 37's chief petitioners appearing in the voters' pamphlet, which stated:

> Opponents of Ballot Measure 37 are trying to scare voters into thinking the measure will prevent the state government and local governments from enacting nuisance abatement laws. This is incorrect. Nuisance abatement laws are exempted from Ballot Measure 37 protections, but again, a law that is currently considered a regulation of land use law under Oregon law cannot be re-characterized as a nuisance abatement ordinance in order to avoid Ballot Measure 37.[312]

This statement appears to contradict itself. On the one hand, excepting "nuisance abatement laws" from Measure 37's compensation requirement seems to encompass a broader spectrum of laws than just public nuisances at common law. On the other hand, the admonition that laws now categorized as land use laws are not exempt from the measure's compensation requirement seems to limit the scope of the exception—as well as take it out of its context as a land use law itself.[313]

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facts at issue, the operation of a chemical pesticides waste site in violation of hazardous waste statutes did not constitute a public nuisance). For a discussion of the difficulties of defining common law nuisances in the context of takings claims, see Humbach, *supra* note 299, at 10-18 (stating "common law nuisance has never confined courts to a reiteration of past cases declaring certain past uses to be nuisances," "public nuisance is, if anything, even more indeterminate than private nuisance in the range of behavior to which it can potentially apply," and "[nuisance law] is not a flat set of prohibitions against various deleterious activities or blameworthy conduct. It is, instead, a multi-factored balancing process for deciding which harms to prohibit.").

310. Measure 37, *supra* note 1, at pmbl.

311. *See* Crook County (No. 05CV0015), *supra* note 266, at 8 (noting that Measure 37, by its own terms, became part of the comprehensive land use planning statute and should be interpreted in the context of comprehensive land use planning).

312. Ballot Measure 37, Chief Petitioners' Statements, http://www.measure37.com/measure%2037/chief_petitioners_statements.htm (last visited Nov. 8, 2007).

313. Another of the chief petitioners' arguments in favor emphasized the fact that land use laws were not exempt from the measure's compensation requirement, stating "there currently exists a body of law in Oregon which defines what constitutes regulation of land use. It is those regulations

The ambiguity of the text and context of the measure's nuisance exception arguably broaden its potential reach. Given the courts' use of common law public nuisance to interpret nuisance statutes,[314] the contextual nature of public nuisance, and the placement of Measure 37 within the comprehensive land use planning statute, the language of this exception may afford courts considerable latitude in determining which laws qualify for the exception.[315]

Although not directly relevant to interpreting the provision's ambiguity,[316] the historical context of Measure 37's nuisance exception sheds some light on the extreme libertarian philosophy underlying the measure. Measure 37's precursor, Measure 7, also contained an exception for public nuisance laws, which excepted from its compensation requirement the "adoption or enforcement of historically and commonly recognized nuisance laws."[317] Measure 7's language was broader than Measure 37's, including the word "adoption" and a reference to plural "laws."[318] In a 2001 opinion interpreting Measure 7, state Attorney General Hardy Myers emphasized the exception's broad language and interpreted it to include restrictions of activities "that have historically and commonly been recognized as a nuisance by the judicial, legislative or quasi-legislative branches of government."[319] According to the Attorney General, the Measure 7 exception was not limited to common law public nuisances,[320] but rather was broad enough to include statutorily defined

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that are subject to the provisions of Ballot Measure 37. The state government and/or local government should not be allowed to rename a land use regulation simply to avoid the protections of Ballot Measure 37." *Id.*

314. Humbach, *supra* note 299, at 7 (noting courts' use of common law of nuisance in interpreting validity of nuisance statutes); Bowden v. Davison, 289 P.2d 1100, 1111 (Or. 1955) (using common law nuisance to determine the validity of nuisance provisions of a horse-round-up statute).

315. Modern statutes embodying common law public nuisance principles might well qualify for the measure's exception. For instance, since pollution has long been considered a common law public nuisance, state pollution control statutes might fall within the measure's public nuisance exception. *See, e.g.*, 1 STATE ENVTL. L. § 3:1 (2006) (noting that most states consider pollution a classic public nuisance).

316. *See supra* notes 281, 291-94 and accompanying text, discussing court's focus on voter—not drafter—intent in interpreting ambiguous terms in ballot initiatives.

317. Measure 7, *supra* note 2, at § (b).

318. *Id.* Measure 7 provided:

> For purposes of this section, adoption or enforcement of historically and commonly recognized nuisance laws shall not be deemed to have caused a reduction in the value of a property. The phrase 'historically and commonly recognized nuisance laws' shall be narrowly construed in favor of a finding that just compensation is required under this section.

Id.

319. Or. Op. Att'y. Gen., *supra* note 113 at *13.

320. The opinion is somewhat contradictory in its treatment of laws that codify common law public nuisance. In the opinion's summary, the Attorney General concluded that

> [t]he prohibition of certain uses of property as a common law nuisance is not within this exception because there is no property right to maintain a nuisance and therefore the prohibition does not constitute a regulation restricting a use that is part of the owner's property right to begin with.

Id. at *14. However, later in the opinion, the Attorney General stated:

public nuisances[321] as well as "local enactments that function to prevent harm or injury to the rights of the public or to public health, safety or morals . . . if they govern a type of use of private property that has been historically and commonly recognized as a nuisance by judicial or legislative bodies in Oregon."[322] The breadth of the Attorney General's interpretation of Measure 7's exception prompted some observers to suggest that Measure 7's compensation requirement might be quite limited.[323]

Unlike Measure 7, Measure 37 limited its exception to "public nuisances under common law," as distinguished from statutory public nuisances in the context of defining background principles restricting the use of property.[324] Attempting to draw this distinction, the measure's drafters appeared to have seized upon short-lived United States Supreme Court dicta that tried to distinguish between common law and statutory public nuisance.[325] The Supreme Court never fully embraced this dis-

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> The text of Measure 7 also indicates that the voters intended to exempt more than common law nuisance. The voters excepted from the right to compensation, the "adoption or enforcement" of certain "nuisance laws." The voters' use of the plural "nuisance laws" is revealing. If the voters had intended to exempt only the abatement of common law nuisance, they would have used the singular "law." Similarly, the fact that the voters also exempted the "adoption" of laws demonstrates that this set of laws includes more than the enforcement of existing rights to abate a common law nuisance, but rather includes laws that are enacted after the effective date of the Measure. As a result, we believe that the exception for "nuisance laws" in subsection (b) of Measure 7 applies to a set of "laws" that goes beyond common law public nuisance law.

Id. at *185-86. What is clear from the opinion is that the Attorney General thought that government had no obligation to compensate landowners under Measure 7 for restrictions based on either traditionally recognized statutory public nuisances or common law public nuisances. *Id.* at *202 (noting that the exception includes "at least the nuisance laws found today at [OR. REV. STAT. §] 105.550 to 105.600 and [OR. REV. STAT.] chapter 167, and their counterparts in local government ordinances").

321. The opinion stated that Measure 7 excepted nuisance laws codified at chapter 167 and sections 105.550 through 105.600 of the Oregon Revised Statutes. *Id.* at *202-03. These statutory nuisances are quite broad, including actions newly identified as nuisances, such as improperly installing airbags in cars. Chapter 167 of the Oregon Revised Statutes concerns prostitution, obscenity, gambling, offenses involving controlled substances, offenses against animals, offenses involving tobacco, and various miscellaneous crimes such as creating a hazard, improper repair of vehicle airbags, and concealing the birth of an infant. OR. REV. STAT. §§ 167.022-167.055 (2005). Sections 105.550 through 105.600 declare use of property for prostitution, illegal drug activity, and unlawful gambling to be nuisances and authorize citizens as well as the Attorney General to bring abatement actions. OR. REV. STAT. § 105.550-105.600 (2005).

322. Or. Op. Att'y. Gen., *supra* note 113, at *202-03. "Historically and commonly recognized" meant that there was "a substantial history of regulation of the type of use throughout a significant part of the state." *Id.* at *226-27.

323. *See* Dave Hogan, *Measure 7 Not Retroactive, Myers Says*, OREGONIAN, Feb. 14, 2001, at A01 (noting the reaction to Attorney General's opinion and quoting one of the bill's proponents stating that the interpretation limited the amount of compensation for which the government would be liable).

324. *See* Measure 37, *supra* note 1, at § 3(A). Measure 37's exception excuses from compensation only restrictions "recognized as public nuisances under common law." The provision omits Measure 7's "adopted" and plural "laws," perhaps suggesting that Measure 37's drafters meant to exclude the statutorily created nuisances that the Attorney General included in his interpretation of Measure 7's exception. *See supra* notes 320-21.

325. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992) (majority opinion stating that background principles "cannot be newly legislated or decreed.").

tinction, however,[326] and it was subsequently abandoned by a Court majority.[327] Nevertheless, Measure 37's drafters appear to have been influenced by the Court's short-lived effort to require compensation for "newly legislated or decreed" public nuisances, but not public nuisances recognized at common law.[328] But limiting Measure 37's nuisance exception to common law nuisances would sever common law nuisance from statutory nuisance in a manner before now unrecognized by the courts, drastically curtailing the legislature's ability to enact new regulatory initiatives in response to changed conditions.

B. The Exception for Public Health and Safety Measures

Section 3(B) exempts from Measure 37's compensation requirement land use regulations "restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations."[329] The exception pointedly omits "welfare," the inclusion of which would have largely eviscerated the measure's compensation requirement by taking most land use restrictions out of its purview.[330] Nonetheless, the health and safety exception is potentially

326. Justice Kennedy disagreed with Justice Scalia's distinction between common law and statutory public nuisances, maintaining in his concurrence that background principles should not be limited to the common law of nuisance but must be flexible enough to take into account legislative responses to changing conditions. *Id.* at 1035 (Kennedy, J. concurring) ("[T]he common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and independent society. The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations whatever their sources."). Moreover, Scalia's majority opinion also actually embraced the notion that background principles of nuisance have the potential to evolve beyond their present scope. *Id.* at 1031 (majority opinion) (noting that "changed circumstances may make what was previously permissible no longer so").

327. *See, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606, 627 (2001) (majority opinion) (noting "[t]he right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions"); Tahoe-Sierra Presidential Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 352 (2002) (Rehnquist, C.J., dissenting) (citing *Palazzolo* and acknowledging that certain zoning and land-use laws may constitute background principles, because "zoning and permit regimes are a longstanding feature of state property law"); *see also* Blumm & Ritchie, *supra* note 25, at 355-58 (2005) (discussing the Supreme Court's taking jurisprudence, which has recognized that some statutes can constitute background principles, and concluding that there is "widespread agreement among the [Supreme] Court's members that at least some valid zoning and land use regulations are background principles").

328. *Lucas*, 505 U.S. at 1029. So, for example, where Measure 7 might exempt government from compensating landowners for a law disallowing the use of property for pigeon racing, Measure 37 arguably would not. *See supra* note 318-19 (discussing the types of laws the Attorney General considered to be included by Measure 7's exception).

329. Measure 37, *supra* note 1, at § 3(C).

330. Had the exception included land use restrictions in furtherance of the public welfare, the number of land use regulations for which government would have to compensate landowners would have greatly diminished, because the state's power to regulate for the general welfare has traditionally been interpreted very broadly. *See generally* Berman v. Parker, 348 U.S. 26, 33 (1954) (upholding against Fifth Amendment challenge government's condemnation of private property in furtherance of a plan to eliminating slums in Washington D.C., because aesthetic values were part of legislature's police power to preserve the general welfare and were thus legitimate ends for condemnation, stating "[t]he concept of public welfare is broad and inclusive . . . It is within the power of the legislature to determine that a community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled"); Or. City v. Hartke, 400 P.2d 255 (Or. 1965)

quite sweeping. No court has yet interpreted the exception, but statements in the voters' pamphlet and by the Oregon governor's office and recent legislative proposals have addressed the scope of the exception.

The voters' pamphlet included an argument in favor by the measure's chief petitioners which sought to limit the scope of the exception.[331] The petitioners stated that "[i]t is not our intention that Ballot Measure 37 be interpreted in such a way as to allow statutes . . . and other means of regulation currently defined . . . as land use regulation to be bootstrapped into the definition of building codes, public health and safety codes, sanitation codes, or public welfare codes, by courts."[332] The petitioners maintained that "there currently exists a body of law in Oregon which defines what constitutes regulation of land use," and these were subject to the measure's compensation requirement.[333] Government, the petitioners maintained, "should not be allowed to rename a land use regulation simply to avoid the protections of Ballot Measure 37."[334] The petitioners' statement, though relevant to resolving ambiguities, does little to clarify the scope of the exception. The line between what constitutes a health and safety regulation and what constitutes a land use regulation is hardly as clear as the proponents suggested. For instance, Oregon's land use planning law is explicitly premised on the necessity of planning to ensure citizens' health and safety.[335] The petitioners' inclusion of "welfare codes" in the list of laws that qualify for the exception further confuses matters.[336]

(finding it within city's police power to enact zoning laws excluding certain uses of property for aesthetic reasons, because general welfare encompasses these values); *see also* Meg Stevenson, *Aesthetic Regulations: A History*, 35 REAL EST. L.J. 519 (2007) (discussing the evolution of the incorporation of land use regulation for aesthetics into the conception of general welfare police power).

331. Chief Petitioners' Statements, *supra* note 312. The petitioners stated that they were providing their statement "in order to instruct and aid Oregon courts, so to avoid the courts [sic] from misinterpreting our intent behind this measure, as Oregon courts have a habit of doing." *Id.*

332. *Id.*

333. *Id.*

334. *Id.*

335. *See* OR. REV. STAT. § 197.005(1) (2007) (stating that "[u]ncoordinated use of lands within this state threatens the . . . health, safety . . . and welfare of the people of this state"); OR. REV. STAT. § 92.046(1) (2007) (providing that counties may adopt regulations requiring the approval of proposed partitions in order "to promote the public health, safety, and general welfare . . . .").

336. *See supra* note 330 and accompanying text (discussing breadth of state's power to regulate for general welfare). Oregonians In Action nonetheless touts this Argument in Favor as limiting the scope of the exception in "Frequently Asked Questions" section of its website. *See* Oregonians In Action, Ballot Measure 37: Frequently Asked Questions, Question No. 6, *available at* http://measure37.com/faq.htm#6 (last visited Nov. 8, 2007). Interestingly, Oregonians In Action also lists "traffic safety regulations" as an example of the health and safety regulations exempt from Measure 37's compensation requirement. *Id.*

According to the Oregon governor's office, the exemption covers laws "reasonably related to the achievement of" public health and safety.[337] The state opined:

> This exemption likely does not include laws for the protection of economic, social or aesthetic interests (or that aspect of the traditional "police power" that may be described as "general welfare"). However, a law that is reasonably related to public health or to public safety will come within the exception, even if it has some incidental economic, social or aesthetic benefit.[338]

The Oregon legislature also took up the health and safety exception. During the 2007 legislative session, it voted to refer a comprehensive revision of Measure 37, House Bill 3540, to the state's voters this upcoming November.[339] The bill includes a definition of "protection of public health and safety" as

> a law, rule, ordinance, order, policy, permit or other governmental authorization that restricts a use of property in order to reduce the risk or consequence of fire, earthquake, landslide, flood, storm, pollution, disease, crime or other natural or human disaster or threat to persons or property including, but not limited to, building and fire codes, health and sanitation regulations, solid or hazardous waste regulations and pollution control regulations.[340]

Even this revised language, however, leaves considerable ambiguity about what laws fall under the health and safety exception. For instance, state laws regulating the filling of wetlands, which require landowners to obtain permits from the Department of State Lands before removing material from riverbanks or streambeds, or filling in wetlands, might or might not qualify.[341] The statute's policy statement invokes health and safety, declaring that "unregulated removal of material from the beds and banks of the waters of this state may create hazards to the health, safety and welfare of the people of this state."[342] It also invokes recreation, the economy, fishing, and navigation,[343] however, spotlighting the difficulty

337. Initial Questions & Answers, Governor Theodore R. Kulongoski, 2004 Oregon Ballot Measure 37, *available at* http://www.oregon.gov/LCD/docs/measure37/m37qanda.pdf ("The use of the word 'and' does not mean that the law must apply to both 'health and safety.' Instead, compensation under Measure 37 is not required as long as the law is reasonably related to one of those purposes.").

338. *Id.*

339. H.B. 3540, 74th Leg. Assem., Reg. Sess. (Or. 2007). House Bill 3540 is discussed in detail *infra* notes 464-94 and accompanying text.

340. H.B. 3540 § 2(18).

341. *See* OR. REV. STAT. § 196.810(1)(a) (2007).

342. OR. REV. STAT. § 196.805(1) (2007).

343. *Id.* The policy statement provides:

> The protection, conservation and best use of the water resources of this state are matters of the utmost public concern. Streams, lakes, bays, estuaries and other bodies of water in this state, including not only water and materials for domestic, agricultural and industrial use but also habitats and spawning areas for fish, avenues for transportation and sites for commerce and public recreation, are vital to the economy and well-being of this state and

of distinguishing between laws that protect health and safety and those that protect welfare more generally.[344]

C. The Exception for Compliance with Federal Law

Section 3(C) of Measure 37 excepts from its compensation requirement land use measures "to the extent the land use law is required to comply with federal law."[345] The exception contains a number of ambiguities. What "federal law" is exempted—statutes, regulations, or court decisions—is not clear. What state land use laws are "required" by federal law is also not obvious. This exception might or might not apply to state statutes and local ordinances implementing federal anti-discrimination laws,[346] Endangered Species Act requirements,[347] cooperative federalism statutes aiming to regulate activities consistent with a federally required standard,[348] statutes making a state eligible for federal funds,[349] and statutes implementing interstate agreements.[350] Whether a

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its people. Unregulated removal of material from the beds and banks of the waters of this state may create hazards to the health, safety and welfare of the people of this state. Unregulated filling in the waters of this state for any purpose, may result in interfering with or injuring public navigation, fishery and recreational uses of the waters. In order to provide for the best possible use of the water resources of this state, it is desirable to centralize authority in the Director of the Department of State Lands, and implement control of the removal of material from the beds and banks or filling of the waters of this state.

Id.

344. Other sections of the wetlands fill and removal law instruct the director of the Department of State Lands to issue permits if the proposed fill will not "unreasonably interfere with the paramount policy of this state to preserve the use of its waters for navigation, fishing and public recreation," and mandate that the director take into account nine factors, only one of which deals with health and safety. OR. REV. STAT. § 196.825(2)-(3) (2005) (listing factors to be considered, including "whether the proposed fill conforms to sound policies of conservation and would not interfere with public health and safety"; other factors include economic impact, impact on recreation, public benefits resulting from the fill, and compatibility with comprehensive plans).

345. Measure 37, *supra* note 1, at § 3(C).

346. *See, e.g.*, OR. REV. STAT. § 447.210-447.280 (making certain buildings, including private entities such as clubs and churches, accessible to persons with disabilities, as did the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (2006)).

347. *See, e.g.*, OR. REV. STAT. § 197.460 (2005) (requiring counties to ensure that destination resorts are compatible with the site and that habitat of threatened or endangered species is retained); OR. REV. STAT. § 527.710 (2005) (requiring certain forest practices to protect federally-listed species); OR. REV. STAT. § 517.956 (2005) (prohibiting the loss of threatened or endangered species' critical habitat as a result of certain mining processes).

348. *See, e.g.*, OR. REV. STAT. § 468B (2005) (Oregon water quality statutes adopted in compliance with the federal Clean Water Act, 33 U.S.C. §§ 1251-1387 (2006)); OR. REV. STAT. § 468A (2005) (Oregon clean air statutes adopted in compliance with the federal Clean Air Act, 42 U.S.C. §§ 7401-7671 (2006)); OR. REV. STAT. § 654 (2005) (Oregon Safe Employment Act adopted in compliance with the federal Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.* (2006)); OR. REV. STAT. §§ 459.046, 466.086 (2005) (state laws adopted in compliance with the federal Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.* (2006)).

349. For example, 16 U.S.C. § 1455b(c)(3) (2006)directs the federal Secretary of Interior to withhold funding from states which fail to submit to it comprehensive coastal nonpoint pollution control programs under the federal Coastal Zone Management Act. The Oregon Department of Environmental Quality reports on its website that it has promulgated a number of regulations which, together, constitute a nonpoint pollution control program, and that it has submitted this plan to EPA and NOAA in 1995, received conditional approval in 1998 and has "completed all but a few" of the requested amendments. *See* Oregon Coastal Management Program, http://www.oregon.gov/LCD/OCMP/WatQual_Intro.shtml (last visited Nov. 8, 2007) (discussing

local government must compensate landowners for state statutes or local ordinances that are more restrictive than required by federal law is also unclear.[351] Neither the text nor the context of Measure 37 resolves these ambiguities.[352] But an Oregon Court of Appeals decision[353] and the state Attorney General's 2001 interpretation of Measure 7's federal law exception provide some guidance.[354]

The Oregon Court of Appeals interpreted the federal law exception in the context of land use regulations passed by three Oregon counties located within the Columbia River Gorge National Scenic Area—an area including parts of three counties in Washington and three counties in Oregon[355]—designated in 1986 by Congress as a national scenic area in order to protect its scenic, cultural, recreational, and natural resources.[356] In 2005, two landowners in Hood River County, one of the three Oregon counties in the scenic area, filed Measure 37 claims, seeking compensation for land use ordinances that restricted the subdivision and development of their property. The Columbia River Gorge Commission ("Gorge Commission") then filed suit, claiming that Measure 37 excepted from its compensation requirement land use ordinances that implemented the scenic area act and the Commission's management plan, because they

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Oregon's coastal nonpoint pollution control program); *see also* 23 U.S.C.A. § 158 (2007) (directing Secretary of Transportation to withhold a portion of federal highway funding from states with minimum drinking ages below 21 years old); OR. REV. STAT. § 471.430 (2005) (setting minimum drinking age at 21).

350. *See, e.g.*, OR. REV. STAT. § 196.150 (2005) (Columbia River Gorge Compact with Washington State).

351. For example, must a local government compensate a landowner where a county ordinance implementing Endangered Species Act is more protective of habitat than required by the federal act?

352. Neither the voters' pamphlet nor media accounts at the time the measure was adopted explained or discussed the federal law exception.

353. Columbia River Gorge Comm'n v. Hood River County, 152 P.3d 997, 998 (Or. Ct. App. 2007).

354. *See generally* Or. Op. Att'y., *supra* note 113.

355. The Washington counties are Clark, Klickitat and Skamania; the Oregon counties are Hood River, Multnomah and Wasco. *Columbia River Gorge Comm'n*, 152 P.3d at 1002.

356. 16 U.S.C.A. § 544(a) (2007). The act establishing the scenic area authorized Oregon and Washington to create, through an interstate agreement, an explicitly non-federal regional land planning agency, the Columbia River Gorge Commission. § 544c(a)(1)(A) (providing that the Commission "shall not be considered an agency or instrumentality of the United States for the purpose of any Federal law"). In 1987, Oregon and Washington entered into the Columbia River Gorge Compact, which established the Commission. OR. REV. STAT. § 196.150 (2005); R.C.W. § 43.97.015 (2007). The Compact tasked the Commission with developing land use designations and adopting a land use management plan for the scenic area. § 544d(a)-(c). The scenic area act designated nine specific standards for the management plan and county ordinances implementing the plan to preserve farm, forest and open-space land and confine commercial and industrial development to urban areas. § 544d(d). The act specified that, once the Commission developed a management plan, the six counties within the area must each adopt land use ordinances "consistent with the management plan" or the Commission would regulate land use within the scenic area in that county. § 544e(b)(1). The act directed the Secretary of Agriculture to review and approve the Commission's management plan, with which the county zoning ordinances had to be consistent. § 544d(f) (approval of management plan); § 544f(j) (approval of ordinances). *See generally* Michael C. Blumm & Joshua D. Smith, *Protecting the Columbia River Gorge: A Twenty Year Experiment in Land-Use Federalism*, 21 J. LAND USE & ENVTL. L. 219 (2006).

were land use regulations "required to comply with federal law."[357] The landowners countered that the ordinances implemented the Gorge Commission's management plan, not the statute authorizing the scenic area itself, and were thus not ordinances "required to comply with federal law."[358] They maintained that because the Gorge Commission is a state rather than a federal agency, its management plan was state law, and therefore the management plan and county ordinances were not specifically prescribed by the scenic area act.[359] Both the Hood River County Circuit Court and the Oregon Court of Appeals rejected the landowners' arguments, concluding that the ordinances were in fact "required to comply with federal law."[360]

The Court of Appeals concluded that the Gorge Commission was a regional agency and that the interstate compact that created the Commission had the force of federal law.[361] The scenic area act authorized the Gorge Commission to promulgate a management plan and to disapprove county land use ordinances that were inconsistent with the plan.[362] The court emphasized that the act charged the federal Secretary of Agriculture with approving the Gorge Commission's management plan and with reviewing local land use ordinances to ensure compliance.[363] Although the statute did not prescribe specific county land use ordinances, instead setting out standards similar to Oregon's comprehensive land use planning goals, the court concluded that "when correctly understood as comprehensive land use legislation, [the act] *requires* a degree of detail and rigor in the management plan and implementing ordinances far transcending the precatory standards set out" on the face of the legislation.[364]

The Oregon Court of Appeals' interpretation of Measure 37's exception in the Columbia River Gorge context was quite broad. The court relied on the comprehensive nature of the scenic area act to conclude that county ordinances not explicitly required by the federal statute at issue were nonetheless "required to comply with" federal law.[365] Although the

357. *Columbia River Gorge Comm'n*, 152 P.3d at 999.
358. *Id.* at 1002.
359. *Id.*
360. *Id.* at 1004.
361. *Id.* at 1003 (citing Cuyler v. Adams, 449 U.S. 433, 440 (1981) ("[W]here Congress has authorized the States to enter into a cooperative agreement and the subject matter of that agreement is an appropriate subject for congressional legislation, Congress' consent transforms the States' agreement into federal law under the Compact Clause.")).
362. *Id.* at 1004.
363. *Id.*
364. *Id.*
365. The court did not inquire into the relationship between the ordinance and specific provisions in the Commission's management plan in order to determine whether the restrictions placed on the landowners' property were greater than required by federal law. Instead, the court emphasized the degree of federal oversight provided by the Secretary of Agriculture's review of the management plan and the local ordinances. *Id.* The court appeared to have concluded that any local ordinance approved by the Commission and Secretary fit within Measure 37's exception, regardless of how drastically it restricted a landowner's property. *Id.*

decision may be limited to the factually unique context of the scenic area act, it could also signal the Oregon courts' willingness to interpret Measure 37's exception broadly to include all state statutes passed to comply with comprehensive federal schemes, such as those involving clean water, clean air, and endangered species.

The state of Oregon will also likely interpret Measure 37's exception broadly. In his 2001 opinion, the Attorney General interpreted the parallel exception in Measure 37's precursor, Measure 7, which provided that a local government "may impose, to the minimum extent required, a regulation to implement a requirement of federal law without payment of compensation."[366] According to the Attorney General, this exception would have applied to "regulations that give practical effect to something that federal law calls for or demands."[367] Under the Attorney General's analysis, state statutes "implement[ing] requirements of federal law" included state statutes protecting endangered species, state clean water, clean air and waste management statutes, and state statutes implementing interstate compacts.[368] Not all these state statutes avoided Measure 7's compensation requirement, however, because of the exception's restrictive "to the minimum extent required" language. The Attorney General concluded that "required" meant that a state statute was "called for" by federal law.[369] Statutes passed to regulate resources to a standard mandated by the federal government under its Commerce Clause or treaty making authority were "called for" by federal law,[370] as were statutes passed by a state to comply with interstate compacts.[371] But state statutes enacted in order to qualify for federal funds were not "called for" by federal law, because there federal law did not preempt state law, and the state had a choice whether to implement legislation to comply with the federal standard.[372] The Attorney General also interpreted the phrase "to

366. Measure 7, *supra* note 2, at § (c); Or. Op. Att'y Gen. 284, *supra* note 113, at *15.

367. *Id.* at *276.

368. *Id.* at *228-38.

369. *Id.* at *302. Any narrower interpretation, reasoned the Attorney General, would make the exception meaningless, because federal law cannot actually require, in the sense of directly commandeering, state regulation. *Id.* at *245 (citing New York v. United States, 505 U.S. 144, 178 (1992)).

370. *Id.* at *236.

371. *Id.* at *237.

372. *Id.* The Attorney General also opined Measure 7's federal law exception covered instances beyond those in which a federal statute required states to comply with federal law. According to the Attorney General, the exception might also exempt instances in which a state entered into a contract or other binding commitment to act in compliance with federal law. *Id.* at *16,* 32-*33. The Attorney General reached this conclusion as follows:

> Because the limitation "to the minimum extent required" modifies the verb "impose," we conclude that the voters intended the exception in subsection (c) of Measure 7 to apply only if the regulating entity is "required" to impose the regulation. The word "required" has no obvious subject to identify who or what might be requiring the regulating entity to impose the regulation. Intuitively, one might expect that the voters intended to refer to federal law. We are reluctant to conclude, however, that the federal law, the requirements of which are being implemented, is the only source of the regulating entity's mandate to impose the regulation because there is nothing in the actual text of subsection (c)

the minimum extent required" to limit the exception to state laws that were "no broader in scope, in terms of [their] restriction on the use of private real property, than the requirement of federal law being implemented," and that the restriction was the minimum required of the regulating entity.[373]

The language of Measure 37's exception is potentially narrower than that of Measure 7's. Measure 37's provision exempts only those regulations required to "comply with" federal law, which might exclude many laws passed to "implement [ ] requirement[s] of" federal laws.[374] It is therefore possible that state laws passed to retain regulatory control of an area in which federal standards apply, which "implement" federal laws, such as state clean water statutes, are not required to "comply with" federal laws, since Oregon could comply with federal water pollution standards by doing nothing. Given the exception's ambiguity and the Oregon Appeals Court's Gorge Commission decision,[375] however, it may be just as likely that Oregon courts will interpret the provision to encompass a broad array of state laws implementing federal standards.

D. The Pornography Exception

Section 3(D) of Measure 37 exempts land use regulations "restricting or prohibiting the use of a property for the purpose of selling pornography or performing nude dancing," while expressly stating that the provision was not intended to "affect or alter rights provided by the Oregon or United States Constitutions."[376] While professing to "take no position on social issues, including pornography," Measure 37's proponents included this provision in an effort to preempt arguments by the measure's opponents that the measure would cause the government to support pornography by requiring it to compensate pornographers for land use laws limiting their ability to do business.[377] The baldly political nature of the

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to suggest such a limited interpretation. Moreover, if that were what was intended, the sentence could more simply have stated that "a regulating entity may impose a regulation to implement federal law if required to do so by that law."

Id at *240-41. Measure 37's provision excepts land use regulations "to the extent the land use regulation is required to comply with federal law." Measure 37, *supra* note 1, at § (3)(C). The language, like Measure 7's, leaves open the possibility that the obligation to comply with federal law may come from a source other than the federal law being implemented.

373. Or. Op. Att'y Gen., *supra* note 113, at *255-56.

374. Measure 37, *supra* note 1, at § 3(C); Measure 7, *supra* note 2, at § (c).

375. Columbia River Gorge Comm'n v. Hood River County, 152 P.3d 997 (Or. Ct. App. 2007), discussed in *supra* notes 354-64 and accompanying text.

376. Measure 37, *supra* note 1, at § 3(D).

377. *See* Oregonians In Action, Ballot Measure 37, Question & Answers, Question No. 10, *available at* www.measure37. com/measure%2037/faq.htm (last visited Nov. 8, 2007) (explaining why Oregonians In Action included the section 3(D) exception). Opponents of a 1995 Washington state takings initiative successfully defeated that measure by highlighting that it would require voters to compensate pornographers. *See* Michael Paulson, *Lawmakers Still Back Land-Use Compensation*, SEATTLE POST-INTELLIGENCER, Nov. 9, 1995, at A1 (quoting state senator as stating that those campaigning against the initiative alleged "that there would be porno shops in your neighborhood"). Oregonians In Action stated on its website that "property rights opponents defeated a takings initia-

exemption is underscored by the fact that regulations specifically targeting pornographic establishments are prohibited under the Oregon Constitution.[378] But on the other hand, section 3(D) may itself be unconstitutional because it disadvantages certain property owners (by not requiring compensation for regulations that restrict their use of property) based solely on their protected speech activities.

Neither the Oregon Supreme Court nor the Marion County Circuit Court directly addressed Measure 37's anti-pornography provision.[379] However, the Oregon Supreme Court did address the implications of similar anti-pornography provisions contained in Measure 7, which sought to amend the Oregon Constitution.[380] Interpreting Measure 7's anti-pornography provision, the Supreme Court noted that the Oregon Constitution prohibits not only regulations that explicitly target expression, but also regulations that treat those who sell expressive material more restrictively than those who sell other merchandise.[381] The court concluded that by permitting the state and local government to choose not to pay a property owner because of the expressive activity in which she engaged (for example, selling pornography), the measure "essentially plac[ed] a price tag on the property owner's right of free expression" and, consequently changed the scope of the free expression rights guaranteed by Article I, section 8 of the Oregon Constitution.[382]

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tive in the State of Washington by . . . arguing that voters would be forced to compensate pornographers if the Washington law was adopted. The addition of the 'pornography' exemption was necessary to stop Measure 37 opponents from making the same frivolous, baseless argument against Measure 37." Oregonians In Action, Ballot Measure 37, Question & Answers, Question No. 10, *available at* www.measure37.com/measure%2037/faq.htm (last visited Nov. 8, 2007).

378. *See* OR. CONST. art. I, § 8 ("[n]o law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."); Portland v. Tidyman, 759 P.2d 242, 247, 251 (Or. 1988) (finding city ordinance restricting siting of adult establishments unconstitutional because it was "flatly directed against one disfavored type of pictorial or verbal communication," and because the city had failed to demonstrate that the specific type of communication in question caused invidious effects that would justify its restriction).

379. The Marion County Circuit Court decided that, since none of the plaintiffs challenging Measure 37 proposed to use their property to sell pornography, their free expression challenge to the provision was not justiciable. MacPherson v. Dep't of Admin. Servs., No. 05C10444, slip op. at 17 (Marion County Cir. Ct. Oct. 14, 2005), *available at* http://www.ojd.state.or.us/mar/documents/Measure37.pdf; *see also supra* note 175 (discussing court's dismissal of free expression claim). Plaintiffs do not appear to have appealed the court's dismissal of their free expression claim. *See* MacPherson v. Dep't of Admin. Servs., 130 P.3d 308, 311 (Or. 2006).

380. *See supra* notes 128-35 and accompanying text (discussing League of Or. Cities v. Oregon, 56 P.3d 892 (Or. 2002), which concluded that Measure 7 violated the separate vote provisions of the Oregon Constitution by including two constitutional amendments on a single ballot). The inclusion of a pornography exception to its compensation requirement ultimately led to the Oregon Supreme Court's concluding that the measure was unconstitutional. *League of Or. Cities*, 56 P.3d at 910-11.

381. *League of Or. Cities*, 56 P.3d at 908 (citing City of Eugene v. Miller, 871 P.2d 454 (Or. 1994)).

382. *Id.* at 909.

The Supreme Court left open the possibility that a "regulation ostensibly directed against expression might pass constitutional muster, provided that such a regulation in fact was directed toward negative effects sought to be prevented and also specified the harm that otherwise would arise if the regulation were not adopted."[383] Under those circumstances, the Supreme Court thought "it is possible that a governmental entity, today, could craft a regulation that prohibits the use of a property for the purpose of selling pornography without running afoul of Article I, section 8."[384]

Although no court has addressed whether Measure 37's anti-pornography provision passes constitutional muster, it seems hardly likely that it would, since its language is broader than Measure 7's, including regulations that "restrict" as well as those that "prohibit" pornography and nude dancing.[385] Measure 37 also singles out a form of expression for disparate treatment, is not directed at abrogating negative effects incident to that form of expression, and does not articulate what the harms that would be avoided might be.[386]

The Marion County Circuit Court did address whether Measure 37's pornography exemption is severable from the measure's other provisions, concluding that the provision, even if unconstitutional, could be severed from the measure pursuant to Measure 37's savings clause.[387] Oregon courts honor express severability provisions in "a manner that best reflects the intentions of the voters."[388] Measure 37's legislative history, including the ballot pamphlets and surrounding press, offers no insight into the voters' intent with respect to the measure's savings clause. Interpreting a similar savings clause in different ballot measure, however, the Oregon Supreme Court indicated that it will interpret savings clauses broadly as a directive by the voters to the courts to "clean-

383. *Id.*

384. *Id.*

385. Measure 7's provision exempted only those regulation that "prohibited" the use of property for the selling of pornography or nude dancing. Measure 7, *supra* note 2, at § (c). Interpreting the language of the provision, the Attorney General concluded that "only those regulations that expressly prohibit the listed activities" were exempt from the measure's compensation requirement. *See* Or. Op. Att'y. Gen., *supra* note 113, at *5, *87. "Regulations that merely restrict those activities or make them impractical are not within the exception." *Id.* at *88.

386. *See* Portland v. Tidyman, 759 P.2d 242, 251 (Or. 1988); *Miller*, 871 P.2d at 460 (setting out parameters for constitutionally permissible statutes that target, or disparately effect, constitutionally protected expression).

387. *See supra* note 175 (discussing Marion County Circuit Court's dismissal of Plaintiffs' claim that Measure 37 violated the Oregon Constitution's free expression provisions); Measure 37, *supra* note 1, at § 13 (providing "if any portion or portions of this act are declared invalid by a court of competent jurisdiction, the remaining portions of this act shall remain in full force and effect").

388. *See, e.g.*, Advocates for Effective Regulation v. City of Eugene, 32 P.3d 228, 231 (Or. App. 2001) (citing PGE v. Bureau of Labor and Indus., 859 P.2d 1143 (Or. 1993), and interpreting a severability clause of city ballot initiative regarding disclosure of information about hazardous waste, severing several unconstitutional portions of the initiative from the remaining provisions); Vannatta v. Keisling, 931 P.2d 770, 789 (Or. 1997) (severing from political campaign finance initiative certain provisions that violated Oregon Constitution's free expression guarantees).

up" an initiative's unconstitutional elements.[389] On the whole, then, it seems likely that while Measure 37's anti-pornography provision violates the free expression clause of Oregon's Constitution, it could be severed, saving the remaining provisions of the measure.

E. Laws Enacted Prior to the Acquisition of Property

Section 3(E) of Measure 37 exempts from its compensation requirement land use regulations enacted "prior to the date of acquisition of the property by the owner or a family member of the owner who owned the subject property prior to acquisition or inheritance by the owner, whichever occurred first."[390] The exception excuses the government from compensating some landowners, but it also extends Measure 37's compensation requirement potentially deep into the past because it grants to current owners the right to compensation for land use laws passed not only during their tenure as owners but also for those passed during the tenure of their family members.[391] The "inheritance right" created by this exception has no equal in other states, or even in Oregon's intestacy laws.[392]

The provision leaves a number of questions unanswered. Among them are whether the exception requires a family to hold property continuously, or whether it would also apply to situations where property is sold to a non-family member but subsequently reacquired by the family; whether the provision applies to corporations that transfer property among sister corporate entities; and how the exception interacts with the measure's waiver provisions. The last uncertainty—whether owners of property subject to a land use law enacted prior to their acquisition of the property but during the tenure of a family member's ownership are entitled to a waiver of that law if government chooses not to compensate—has perhaps the most far-reaching implications. On the one hand, section 3(E) back-dates an owner's "acquisition" of property for purposes of the measure's compensation requirement to the date on which a family member acquired the property. The measure's waiver provision, however, allows governments to waive land use regulations only "to allow the owner to use the property for a use permitted at the time the owner

389. *Vannatta*, 931 P.2d at 789 (interpreting a savings clause that read "[I]f any part of this Act is held unconstitutional, the remaining parts shall remain in force unless the court specifically finds that the remaining parts, standing alone, are incomplete and incapable of being executed" as a directive from the voters to sever those provisions that were unconstitutional and clean up the rest of the measure in order for it to make sense without those provisions).

390. Measure 37, *supra* note 1, at § 3(E).

391. The measure defines "family member" expansively. *See id.* § 11(A). Present owners of property may be entitled to compensation if the government enforces land use laws enacted at any time before a family member—including distant family members related by marriage, such as step-grandparents in-law—acquired the property. *See supra* notes 160-61 and accompanying text (discussing measure's retroactive reach).

392. *See supra* note 160 (discussing Oregon intestacy law); *supra* notes 114, 225, 227 (discussing other states' regulatory takings legislation); and *infra* notes 402-49 and accompanying text (discussing other states' ballot measures).

acquired the property," making no mention of an inheritance right.[393] If, for example, a property owner who acquired property in 1990 from her father (who in turn acquired the property in 1970) filed a Measure 37 claim seeking compensation for a 1980 provision that prevented her from subdividing her land, would a government be barred from waiving that 1980 regulation and thereby allowing the subdivisions? Or would a government be limited to waiving only those land use restrictions dating back to 1990, the "time the owner acquired the property" and, if so, would such a waiver satisfy the government's compensation requirement under Measure 37?

At least one court has addressed these questions, answering both in the affirmative. In *Cobos v. Marion County*,[394] Judge Thomas M. Hart of the Marion County Circuit Court concluded that Measure 37 provides for two distinct and potentially separate dates—one for calculating compensation owed for land use restrictions that devalue property, and another for determining which land use regulations apply when a government waives land use regulations rather than compensating an owner.[395] The *Cobos* case concerned a Measure 37 claim filed by property owners in Marion County who had inherited two parcels of property, one in 1999 and one in 2001, from family members who had, in turn, inherited the parcels from other family members who had purchased the properties in 1946.[396] The county responded to the claims by exercising its option under section 8 of Measure 37 to waive applicable land use restrictions rather than compensate the landowners; however, it waived only the land use restrictions to which the parcels became subject after 1999 and 2001, the respective dates upon which the present owners acquired the properties, continuing to apply land use restrictions enacted prior to the present owners' acquisition of the property.[397]

Judge Hart upheld the county's actions against a challenge by the property owners, concluding that (1) section 8 authorizes governments to waive land use restrictions in response to Measure 37 claims only to the extent that doing so allows the owner to "use the property for a use permitted at the time the owner acquired the property";[398] (2) "the portion of the statute that permits an owner to recover just compensation for land use regulations enacted during a family member's tenure [section 3(E)] is limited in application to section 1 [the compensation provision] of the

393. Measure 37, *supra* note 1, at § 8 (stating that "the governing body responsible for enacting the land use regulation may modify, remove, or not apply the land use regulation . . . to allow the owner to use the property for a use permitted at the time the owner acquired the property").

394. Cobos v. Marion County, No. 05C16640 (Marion County Cir. Ct., July 11, 2006) (Letter Opinion), *available at* http://www.doj.state.or.us/hot_topics/measure37litigation.shtml (last visited Nov. 8, 2007).

395. *Id.*

396. *Id.* at Ex. B, 1.

397. *Id.*

398. *Id.* at Ex. B, 2.

statute";[399] (3) the measure contains no comparable provision that "makes the waiver provision applicable to rules that became effective during ownership by the current owner's family member";[400] and (4) a government has full discretion whether or not to waive a land use law (so that the owner may use her property as she could have on the date she acquired it) or compensate an owner for lost value due to a land use law (enacted after she, or one of her family members, acquired the property).[401] The plaintiffs did not appeal Judge Hart's decision. Commentators, including Measure 37's drafters, seem to agree that while a current owner's right to compensation extends to land use laws enacted during the prior ownership tenancy of the claimant's family, a government can waive only those land use laws enacted subsequent to the time the current owner acquired the property, and that such a waiver completely satisfies a claim under Measure 37.[402]

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399. *Id.* ("section 3(E) limits the payment provision of section 1 to those situations in which the current owner or a family member of the current owner acquired the property before the offending land use regulations became effective").

400. *Id.* Judge Hart stated that "to the extent the exception contained in section 3(E) could possibly have been understood to apply to section 8, the specific language in section 8 regarding who may obtain the non-application of land use rules indicates a particular intent to limit such a waiver to the current owner." *Id.* at Ex. B, 5.

401. *Id.* at Ex. B, 3 n.4 (citing Measure 37 §§ 8, 10). According to Judge Thomas Hart's interpretation, a government could avoid paying potentially large amount of compensation for land use laws going back many years by waiving only those land use laws of more recent vintage that have been enacted since the claimant acquired land. Judge Hart's responded to the landowner's complaints that this result "deprives property owners of the 'substantive rights granted in Section 1'" by stating that:

> no substantive rights related to non-application of land use rules were granted in section 1 of the statute. That portion of the statute addresses only the monetary compensation granted to property owners. In contrast, Sections 8 and 10 grant public entities discretion to not apply the land use rules instead of compensating the owners. If a public entity chooses this route, only sections 8 and 10 of the statute are relevant, and any exceptions to section 1, including the exception that entitles a current property owner to compensation if the owner's family member owned the property at the time the land use rules became effective, are inapplicable.

Id. at Ex. B, 6.

402. Oregonians In Action, the organization largely responsible for drafting and supporting Measure 37, stated in the "Frequently Asked Questions" section of its website: "Measure 37 distinguishes between compensation claims and waiver claims. Compensation claims revert to the date property was acquired by the family member. A claim for a waiver reverts to the date the *present owner* acquired the property." Oregonians In Action website, Frequently Asked Question No. 23, http://www.measure37.com/measure%2037/faq.htm#22 (last visited Nov. 9, 2007); *see also* Sommers, *supra* note 162, at 216-17 (same). David Hunnicutt, Oregonians In Action's executive director, explained in a 2005 speech that this distinction had been adopted by the drafters in order to undercut potential arguments by the measure's opponents. *See* David J. Hunnicutt, Executive Director, Oregonians In Action, Oregon Law Institute Conference Speech at the "Measure 37 Summit" (Jan. 5, 2005) (stating "at the time that the Measure was drafted we were afraid that we would face the argument that if you go back two generations then . . . counties would have to allow people to use land in the way that grandpa could have done it when grandpa purchased the property in 1890 . . . . [t]hat being the case . . . we thought it would make it more difficult to pass the Measure . . . . [w]e wanted to take that argument away from the opponents"), *available at* http://www.doj.state.or.us/hot_topics/pdf/measure37/cobos_msj.pdf (last visited Nov. 9, 2007) (ex. D to State of Oregon Motion for Summary Judgment in *Cobos v. Marion County*, No. 05C16640 (Marion County Cir. Ct. July 11, 2006)).

V. EXPORTING MEASURE 37

The November 2006 election cycle saw voters decide a host of property rights ballot measures around the country. Most of these measures proposed limiting the circumstances in which state governments could exercise their eminent domain power.[403] These measures were a direct response to the Supreme Court's 2005 decision in *Kelo v. City of New London*,[404] which upheld against a Fifth Amendment challenge the city of New London's condemnation and transfer of property from one private party to another for the "public use" of economic development.[405] These citizen initiatives aimed at limiting state condemnation power rode a strong current of public opposition to the perceived implications of the *Kelo* decision.[406] During the November 2006 elections, voters overwhelmingly adopted measures restricting states' eminent domain power in every state in which a pure-*Kelo*[407] initiative was on the ballot.[408]

California, Idaho, and Arizona also saw property rights reform measures on their November 2006 ballots.[409] The measures in these

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403. *See, e.g.*, Ballot Question No. 2 (Nev. 2006) (proposing constitutional amendment providing that transfer of property from one private property to another is not a public use); Amendment 5 (La. 2006) (same; appeared on primary ballot); Initiated Constitutional Amendment 2 (N.D. 2006) (same); Constitutional Amendment 8 (Fla. 2006) (same); Constitutional Amendment 1 (Ga. 2006) (same); Constitutional Amendment 5 (S.C. 2006) (same); Ballot Proposal 4 (Mich. 2006) (statutory amendment); Ballot Question 1 (N.H. 2006) (same); Ballot Measure 39 (Or. 2006) (same); *see also* National Conference of State Legislatures, Property Rights Issues on the 2006 Ballot, http://www.ncsl.org/statevote/prop_rights_06.htm (describing measures, giving vote outcomes, and linking to description of provisions).

404. 545 U.S. 469 (2005).

405. In *Kelo*, the Court, in a 5-4 opinion, ruled that government may exercise its power of eminent domain to condemn privately-owned property, even where that property will eventually be transferred to another private entity, so long as the government's exercise of its condemnation authority furthers public economic objectives. *Kelo*, 545 U.S at 484-86, 489-90; *see* Corinne Calfee, Kelo v. City of New London*:* *The More Things Stay The Same, The More They Change*, 33 ECOLOGY L.Q. 545, 579-81 (2006) (analyzing the *Kelo* decision and describing its aftermath); Amanda Goodin, *Rejecting the Return to Blight in Post-*Kelo *State Legislation*, 82 N.Y.U. L. REV. 177, 195-96 (2007) (same); Richard Dolesh & Douglas Vaira, *Property Rights and Wrongs*, PARKS & RECREATION, Mar. 1, 2007, at 58, *available at* http://www.nrpa.org/content/default.aspx?documentId=6040 (describing *Kelo* backlash).

406. *See* A.L.I.—A.B.A, CONDEMNATION 101: FUNDAMENTALS OF CONDEMNATION LAW AND LAND VALUATION: LEGISLATIVE ACTION SINCE *KELO* 344-57 (2006) (describing, state-by-state, legislative measures aimed at curbing "abuse" of eminent domain for private economic use and noting that 34 states had passed such laws by January 2007); Donald E. Sanders & Patricia Pattison, *The Aftermath of* Kelo, 34 REAL EST. L.J. 157, 168-70 (2005) (describing the backlash to *Kelo*); Kimberly M. Watt, Comment, *Eminent Domain, Regulatory Takings, and Legislative Responses in the Post-*Kelo *Northwest*, 43 IDAHO L. REV. 539, 577-82 (2007) (same; focusing on Idaho's legislative responses to *Kelo*).

407. As opposed to a hybrid eminent domain-regulatory takings initiatives, discussed *infra* notes 409-11.

408. *See* National Conference of State Legislatures, *supra* note 403, (providing voting results).

Nevada's measure must be approved a second time by voters, under Nevada's constitutional requirement that initiatives proposing constitutional amendments be approved by voters in two successive elections. *See* NEV. CONST. art. 19, § 2(4).

409. Proposition 90 (Cal. 2006); Proposition 2 (Id. 2006); Proposition 207 (Az. 2006).

Montana's Ballot Initiative 154, another "*Kelo*-plus" initiative, was struck from the ballot because of irregularities in the manner out-of-state signature gatherers obtained the signatures needed

states, so-called "*Kelo*-plus"[410] initiatives, contained both eminent domain reform provisions as well as Measure 37-type regulatory takings reforms.[411] In addition, Washington saw an initiative that invoked *Kelo* in its preamble but actually contained only Measure 37-type regulatory

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to place the initiative on the ballot. Montanans for Justice v. State, 146 P.3d 759, 775-76 (Mont. 2006) (referring to the "bait and switch" tactics of signature gatherers).

Missouri also saw a citizen initiative to place a "*Kelo*-plus" measure on its ballot. That initiative also foundered on irregularities in the manner in which signatures were submitted and in the fiscal note summary of the initiative, and the secretary of state refused to place it on the ballot. *See* Crim v. Sec'y of State, No. 06AC-CC00211 (Mo. 19th Jud. Cir. Ct. Apr. 27, 2006); Kit Wagar & Steve Kraske, *State Ballot Issues Rejected*, KANSAS CITY STAR, May 26, 2006.

Nevada's Ballot Question 2 initially also contained Measure 37-like provisions, but they were struck from the ballot by the Nevada Supreme Court, which concluded that the inclusion of both eminent domain and regulatory takings provisions in one ballot initiative violated a Nevada constitutional provision that limits ballot initiatives to a single subject. The Nevada Supreme Court allowed the eminent domain portion of the initiative to be placed on the ballot. *See generally* Nevadans for the Protection of Property Rights, Inc. v. Heller, 141 P.3d 1235 (Nev. 2006).

In Oklahoma, the state supreme court struck a "*Kelo*-plus" ballot initiative completely from the ballot for violating the Oklahoma Constitution's provision limiting ballot measures to a single subject. *See In re* Initiative Petition No. 382, 142 P.3d 400, 409 (Okla. 2006); John Greiner, *Court Rules Against Petition on Eminent Domain Protection*, DAILY OKLAHOMAN, June 21, 2006, *available at* 2006 WLNR 10719516.

410. Combining eminent domain and regulatory takings reform in a single ballot measure was controversial, and potentially politically risky. *See, e.g.*, Leonard Gilroy, *By a Landslide, Americans Voted to Protect Their Property*, BUFFALO NEWS, Nov. 19, 2006, at I2, *available at* 2006 WLNR 20139782 (stating that "*Kelo*-plus" initiatives were a more difficult political sell because, while most people agreed with limiting state eminent domain power, regulatory takings reform had strong opposition); Dolesh & Vaira, *supra* note 405, at 1 (discussing "*Kelo*-plus" measures).

411. California Proposition 90, §§ 3, 19(a)(1), (b)(8) (2006) *available at* http://www.voterguide.sos.ca.gov/pdf/prop90_text.pdf (last visited Nov. 9, 2007). California's Proposition 90 amended the state constitution, burying its regulatory takings clause within the eminent domain reforms. It provided that "[p]roperty may not be taken *or damaged* for private use" and then defined "damaged" to include "government actions that result in substantial economic loss to private property," including "downzoning" and "limitations on the use of private air space." *Id.* (emphasis added). For a detailed description of Proposition, *see generally* RICHARD M. FRANK, ALI-ABA INVERSE CONDEMNATION AND RELATED GOVERNMENT LIABILITY, PROPOSITION 90: AN ANALYSIS 669-731 (2007) (describing history of Proposition 90 and analyzing its provisions).

Idaho's Proposition 2 contained eminent domain provisions that would have amended Idaho statute to prohibited the state from using eminent domain to acquire property "if at the time of the condemnation, the public body condemning the property, or its designee, intends to convey fee title to all or a portion of the real property, or a lesser interest than fee title, to another private party." Idaho Proposition 2, § 1 (2006) *available at* http://www.sos.idaho.gov/elect/inits/06init08.htm (last visited Nov. 9, 2007). Its regulatory takings section would have amended Idaho statutes to provide:

> If an owner's ability to use, possess, sell, or divide private real property is limited or prohibited by the enactment or enforcement of any land use law after the date of acquisition by the owner of the property in a manner that reduces the fair market value of the property, the owner shall be entitled to just compensation, and shall not be required to first submit a land use application to remove, modify, vary, or otherwise alter the application of the land use law as a prerequisite to demanding or receiving just compensation under subsection (9) of this section.

Id. § 4 (providing for cause of action where a "land use law continues to apply to private real property more than 90 days after a written demand for just compensation"). Arizona's Proposition 207 amended Arizona statute to redefine "public use" for purposes of the state's exercise of eminent domain to exclude "the public benefits of economic development, including an increase in tax base, tax revenues, employment or general economic health." Arizona Proposition 207, sec. 3, § 12-1136(5)(b) (codified at ARIZ. REV. STAT. ANN. § 12-1136(5)(b)) (2006) *available at* http://www.azsos.gov/election/2006/Info/PubPamphlet/english/Prop207.htm. Proposition 207's regulatory provisions are discussed further *infra* at notes 426-32 and accompanying text.

reform provisions and no eminent domain reform provisions.[412] Of these mixed eminent domain/regulatory takings initiatives, only Arizona's succeeded.[413]

A. Regulatory Takings Initiatives

The regulatory takings portions of the Washington, Idaho, California, and Arizona initiatives were outgrowths of Measure 37.[414] Each measure included provisions similar to Measure 37—guaranteeing just compensation to landowners who suffered any diminution in property value as result of government regulation.[415] The campaigns in support of each of these measures received a significant portion of their funding from organizations affiliated with Howard Rich, a New York-based real

412. Washington Ballot Initiative 933 (2006) *available at* http://www.secstate.wa.gov/elections/initiatives/text/i933.pdf (last visited Nov. 9, 2007). Washington's initiative invoked *Kelo* by stating that "[t]he people find that eminent domain is . . . potentially subject to misuse" and that government "should not take property which is unnecessary for public use or is primarily for private use" but contained only regulatory takings provisions and not any provisions limiting the state's eminent domain powers. *Id.* § 1.

413. Idaho voters resoundingly defeated Proposition 2 by a margin of 76 percent to 24 percent. BEN YSURSA, 2006 GENERAL RESULTS STATEWIDE (2006), http://www.idsos.state.id.us/ELECT/RESULTS/2006/general/tot_stwd.htm (last visited Nov. 9, 2007). Washington's voters soundly defeated Initiative 933 by a margin of 59 percent to 41 percent. SAM REED, 2006 GENERAL ELECTION RESULTS (2006), http://vote.wa.gov/Elections/general/Measures.aspx (last visited Nov. 9, 2007). California voters more narrowly defeated Proposition 90 by a margin of 52.4 percent to 47.6 percent. STATE BALLOT MEASURES 76 (2006), http://www.ss.ca.gov/elections/sov/2006_general/measures.pdf (last visited Nov. 9, 2007).

414. Measure 37's drafters reportedly helped draft other state's measures. *See* Hannah Jacobs, *Searching for Balance in the Aftermath of the 2006 Takings Initiatives*, 116 YALE L.J. 1518, 1526 (2007) (noting that Measure 37s' drafters aided drafters of other states' initiatives, citing personal interview with the other states' drafters); Patty Wentz, *This Land Is Their Land*, WILLAMETTE WK., Nov. 28, 2000, at 21 (describing how Measure 7's drafters, the same as Measure 37's, lectured in other states); Laura Oppenheimer, *Measure 37 Proclaims: Subdivide and Conquer*, OREGONIAN, June 12, 2005, at A1 (describing how Measure 37's drafters traveled to other states, where they were greeted as "the Madonnas and Oprahs of property rights"); *see also* LEONARD C. GILROY, STATEWIDE REGULATORY TAKINGS REFORM: EXPORTING OREGON'S MEASURE 37 TO OTHER STATES 1 (2006) (describing Measure 37 and strategies for exporting the measure to other states), *available at* http://www.reason.org/ps343.pdf.

415. Washington Ballot Initiative 933, §§ 2(2)(a), (b), (d) (2006) *available at* http://www.secstate.wa.gov/elections/initiatives/text/i933.pdf (last visited Nov. 9, 2007); Idaho Proposition 2, §§ 4(5), 6(e) (2006) *available at* http://www.sos.idaho.gov/elect/inits/06init08.htm (last visited Nov. 9, 2007); California Proposition 90, §§ 3, 19(a)(1) (2006) *available at* http://www.voterguide.sos.ca.gov/pdf/prop90_text.pdf (last visited Nov. 9, 2007); Arizona Proposition 207, sec. 3, § 12-1134(a) (codified at ARIZ. REV. STAT. ANN. § 12-1134) (2006) *available at* http://www.azsos.gov/election/2006/Info/PubPamphlet/english/Prop207.htm (last visited Nov. 9, 2007). Idaho and California's provisions were not retroactive. Idaho Proposition 2, §§ 4(5), 6(e) (2006) *available at* http://www.sos.idaho.gov/elect/inits/06init08.htm (last visited Nov. 9, 2007); California Proposition 90, §§ 3, 6 (2006) *available at* http://www.votersguide.sos.ca.gov/pdf/prop90_text.pdf (last visited Nov. 9, 2007). Idaho's measure applied only to land use regulations enacted after an owner acquires the property and after the enactment of the measure—they applied only to regulations passed after the effective date of the initiatives. Idaho Proposition 2, §§ 4(5), 6(e) (2006) *available at* http://www.sos.idaho.gov/elect/inits/06init08.htm (last visited Nov. 9, 2007). Similarly, California's measure applied only to property devalued after the measure took effect. California Proposition 90, § 6 (2006) *available at* http://www.voterguide.sos.ca.gov/pdf/prop90_text.pdf (last visited Nov. 9, 2007). For a description of Arizona's and Washington's measures, see *infra* notes 418-32 and accompanying text.

estate developer and libertarian activist.[416] By some estimates, Rich spent nearly $9 million on property rights initiatives in eight states,[417] including over $1.2 million in support of the Arizona initiative, $3.3 million in support of the California initiative, $800,000 in support of the Idaho initiative, and $360,000 in support of the Washington initiative.[418]

Washington's failed Initiative 933 was the most radical of the proposed ballot initiatives. Although the initiative's language was ambiguous in many places, it contained a number of provisions potentially even more sweeping in scope than Oregon's Measure 37.[419] Its compensation requirement applied to regulations limiting the value of personal as well as real property.[420] The initiative exempted neither regulations to abate public nuisance nor regulations to implement federal law, and its health and safety exemption was more narrowly tailored than Measure 37's.[421] The scope of government's authority to waive offending regulations rather than pay compensation to owners was unclear. Unlike Measure 37,[422] the initiative did not expressly vest governments with authority to waive offending regulations, stating instead that its compensation provision was "not [to] be construed to limit agencies' ability to waive, or issue variances from, other legal requirements."[423] The initiative also

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416. *See* David Crary, *Wealthy New Yorker's Reach Felt Here; Howard Rich Helps Fund Campaign for Initiative 933*, COLUMBIAN (Vancouver, Wash.), Oct. 27, 2006, at C7 (describing Rich's involvement in campaigns); JOHN O'DONNELL, PUBLIC CITIZEN, TAKING THE PUBLIC TRUST: HOW A NEW YORK STATE REAL ESTATE DEVELOPER IS THREATENING STATE GOVERNMENTS IN THE WEST 7-8 (2006) (describing funding and groups affiliated with Rich, including Americans for Limited Government, the Fund for Democracy, the Club for Growth, the Club for Growth State Action, Colorado at its Best, U.S. Term Limits, Montanans in Action).

417. O'DONNELL, *supra* note 416, at 7-8 (listing Arizona, California, Idaho, Missouri, Montana, Nevada, Oklahoma, and Washington).

418. *Id.* at 8; *see also* Curt Woodward, *Land Use Showdown*, COLUMBIAN (Vancouver, Wash.), Oct. 23, 2006, at C2 (stating that as of the date of the article, initiative 933 supporters had raised nearly $800,000 and opponents had raised nearly $2.6 million).

419. *See, e.g.*, Eric De Place & Val Alexander, Editorial, *In My Opinion—Initiative 933—For Washington, It's Measure 37 on Steroids*, OREGONIAN, Aug. 8, 2006, at B09 (arguing that the scope of the initiative would be broader than Measure 37).

420. Washington Ballot Initiative 933, § 2(2)(a) (2006) *available at* http://www.secstate.wa.gov/elections/initiatives/text/i933.pdf (last visited Nov. 9, 2007). Initiative 933 defined "private property" subject to its compensation mandate to include "all real and personal property interests protected by the fifth amendment of the United States Constitution or Article I, section 16 of the state Constitution owned by a nongovernmental entity, including, but not limited to, any interest in land, buildings, crops, livestock, and mineral and water rights." *Id.*

421. *Compare id.* § 2(2)(c)(i) *with* OR. REV. STAT. § 197.352(3) (2005). The Washington initiative exempted regulations "restricting the use of property when necessary to prevent an immediate threat to human health and safety." Washington Ballot Initiative 933 § 2(2)(c)(i) (2006) *available at* http://www.secstate.wa.gov/elections/initiatives/text/i933.pdf (last visited Nov. 9, 2007). But it contained no express exemptions for regulations limiting public nuisance activities or implementing federal law. *Id.* § (2)(2)(c).

422. Measure 37, *supra* note 1, at § 8.

423. Washington Ballot Initiative 933, *supra* note 415, at § 3. Initiative 933's compensation provision provided in its entirety:

> An agency that decides to enforce or apply any ordinance, regulation, or rule to private property that would result in damaging the use or value of private property shall first pay the property owner compensation as defined in section 2 of this act. This section shall not be construed to limit agencies' ability to waive, or issue variances from, other legal

may have compensated owners regardless of whether they acquired their property before or after the offending regulation was enacted.[424] In one sense, however, Initiative 933 may have been more limited than Measure 37: unlike Measure 37, which reached back to provide compensation for any regulations passed after a landowner acquired her property, Initiative 933 might have limited its compensation requirement to restrictions passed after 1996.[425] The initiative was so ambiguously drafted, however, that it was not clear whether the 1996 cut-off applied to all offending regulations or to just certain types.[426]

Arizona's Proposition 207 also mirrored Measure 37. It obligated the state or its political subdivisions[427] to compensate property owners for any land use law enacted after the date on which property was transferred to a landowner that reduces the "fair market value" of the property.[428] Like Measure 37, the proposition explicitly allowed the state to

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requirements. An agency that chooses not to take action which will damage the use or value of private property is not liable for paying remuneration under this section.

Id.; *see also* Amy Rolph, *Study Puts I-933's Cost in Billions But Backers of Land-Use Measure Deride UW Report*, SEATTLE POST-INTELLIGENCER, Sept. 27, 2006, at B1 (citing a University of Washington study concluding, among other things, that government would not be able to waive certain environmental laws under the initiative and would be forced to compensate landowners for diminution in value caused by the regulations, at great financial cost to the state). *See generally* Dolesh & Vaira, *supra* note 405, at 61 (discussing waiver of rules in place of compensation).

424. Washington Ballot Initiative 933, *supra* note 420, at § 3. Initiative 933 made no reference to the time property was acquired, providing only that "[a]n agency that decides to enforce or apply any ordinance, regulation, or rule to private property that would result in damaging the use or value or private property shall first pay the property owner compensation . . ." *Id.*; *see also* Eric Pryne, *Measure 37 and I-933: How They Stack up*, SEATTLE TIMES, Oct. 12, 2006, at A14 (discussing the difference between Measure 37's compensation for regulations passed after an owner acquires property and Initiative 933's provision).

425. Washington Ballot Initiative 933, *supra* note 420, at § 2(2)(b)(i).

426. *Id.* The initiative provided that regulation for which it authorized compensation "includes, but is not limited to," regulation "[p]rohibiting or restricting any use or size, scope, or intensity of any use legally existing or permitted as of January 1, 1996." *Id.* Without including any date restrictions, the provision listed five other types of regulation that would require compensation including regulations "requiring a portion of property to be left in its natural state or without beneficial use to its owner"; "prohibiting maintenance or removal of trees or vegetation"; and maintenance of infrastructure, such as bulkheads and tidegates, "reasonably necessary for the protection of the use or value of private property." *Id.* at §§ 2(2)(b)(ii), (v), (vi). Whether government would have had to compensate landowners for pre-1996 regulations of these types was not clear. *See, e.g.*, Eric Pryne, *Your Guide to Initiative 933*, SEATTLE TIMES, Oct. 16, 2006, at A8, A14 (describing the ambiguities in the initiative's wording and citing Richard Stephens, one of the initiative's drafters, to the effect that the last five categories of the provision were simply examples of regulations covered by the first category, so the 1996 date would also apply to them and noting that "most lawyers studying I-933 said it would require compensation for at least some pre-1996 regulations").

427. Arizona Proposition 207, *supra* note 415, at sec. 3, § 12-1134(a). Proposition 207 obligates the state or "the political subdivision of th[e] state that enacted" the offending land use law to compensate property owners. *Id.* This differs from Measure 37, which imposes the obligation on state entities that "enact[ ] or enforce[ ]" the law. Measure 37, *supra* note 1, at § 1.

428. Arizona Proposition 207, *supra* note 415, at sec. 3, § 12-1134(a). Section 3 of the proposition added a "Private Property Rights Protection Act" to the Arizona statutes. Its Measure 37-like provision provides:

> If the existing rights to use, divide, sell or possess private real property are reduced by the enactment or applicability of any land use law enacted after the date the property is transferred to the owner and such action reduces the fair market value of the property the

waive land use laws rather than pay compensation.[429] Proposition 207 also excepted from its compensation requirement land use restrictions (1) for public health and safety, (2) prohibiting public nuisances under common law, (3) required by federal law, and (4) prohibiting use of property for the sale of pornography and for certain other uses deemed undesirable, such as the sale of liquor or housing of sex offenders.[430] It also excepted land use regulations establishing locations for utility facilities and regulations that "do not directly regulate an owner's land."[431] Unlike Measure 37, the proposition expressly provided that waivers "run with the land," and are thus transferable to subsequent property owners.[432] Perhaps most significantly, unlike Measure 37, Proposition 207 was not retroactive—it exempted from its compensation requirement any regulations that were enacted before its effective date.[433]

B. The Political Landscape

Some observers attributed Arizona voters' adoption of Proposition 207 to the fact that the Arizona business community supported the measure, the measure's inclusion of eminent domain reform as well as regulatory takings provisions, and a successful advertising campaign which, reminiscent of the Measure 37 campaign, adopted the theme of "Keep What You Own" and highlighted injustices to women, the elderly, and minority homeowners.[434]

Opponents challenged the Arizona measure, claiming that it violated a provision of the Arizona Constitution requiring ballot initiatives to identify the sources of revenues that will fund the immediate and fu-

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owner is entitled to just compensation from this state or the political subdivision of this state that enacted the land use law.

Id.

429. *Id.* § 12-1134(E) (providing that state or local government may "amend[], repeal[], or issue[] to the landowner a binding waiver of enforcement of the land use law on the owner's specific parcel"). Neither the California nor Idaho initiatives would have allowed the state to waive enforcement of the land use law rather than waive it, although Washington's initiative would have permitted the state to do so. California Proposition 90, *supra* note 415 (no waiver provision); Idaho Proposition 2, *supra* note 415 (same); Washington Ballot Measure 933, *supra* note 415 (including compensation provision but providing "[t]his section shall not be construed to limit agencies' ability to waive, or issue variances, from other legal requirements. An agency that chooses not to take action which will damage the use or value of private property is not liable for paying remuneration under this section.").

430. Arizona Proposition 207, *supra* note 415, at sec. 3, § 12-1134(B)(1) to (4).

431. *Id.* § (B)(5) to (6).

432. *Id.* § (F) (providing that "any demand for landowner relief or any waiver that is granted in lieu of compensation runs with the land").

433. *Id.* § (B)(7) (exempting land use regulations that "were enacted before the effective date of this section").

434. *See* William Fulton, *Despite Defeat of Prop 90, More Voting on Land Use Restrictions Is Likely* (CALIFORNIA PLANNING & DEVELOPMENT REPORT), Dec. 2006 at 1, *available at* http://goliath.ecnext.com/coms2/gi_0199-6118926/Despite-defeat-of-Prop-90.html#abstract (comparing the California and Arizona campaigns); Dolesh & Vaira, *supra* note 405, at 61-62 (attributing victory to infusion of out-of-state money and inclusion of less controversial eminent domain provisions).

ture costs of an initiative.[435] But a lower court rejected the challenge, and the Arizona Supreme Court affirmed on the ground that violations of the revenue-source provision are not subject to pre-election review and could be maintained only after initiative adoption.[436] Despite these challenges, which may be raised again now that the measure has passed, observers noted that opponents of the initiative failed to wage a strong campaign in opposition.[437]

The defeats of the ballot initiatives in Idaho, Washington, and California were due to a variety of causes. In Idaho, where the initiative lost by the largest margin of any state, observers attributed the defeat to the opponents' effective coalition building and advertising, proponents' lack of organization, and the fact that Idaho already had legislation limiting the state's eminent domain powers.[438] Although both sides had about the same amount of money,[439] opponents of the initiative formed a broad coalition that included conservationists and environmentalists as well as realtors and other business groups, such as the Idaho Association of Commerce and Industry and the Idaho Association of Realtors.[440] This coalition launched a successful advertising campaign, featuring ranchers, dairy farmers, and prominent Idaho politicians from both political parties

435. League of Ariz. Cities and Towns v. Brewer, 146 P.3d 58, 59 (Ariz. 2006).

436. *Id.* at 59, 63 (concluding that Arizona courts may only review ballot measures prior to their adoption for violations of ballot form and signature requirements, and may not pass on their constitutionality until they are adopted by the voters). *See generally* Howard Fisher, *Justices Approve 3 Ballot Measures*, ARIZONA DAILY STAR, Sept. 1, 2006, at B11 (describing the case); *Property Rights Ruling Good News for State's Voters*, YUMASUN.COM, Aug. 21, 2006, http://sun.yumasun.com/google/ysarchive22864.html (describing the lower court's ruling).

437. *See* Dolesh & Vaira, *supra* note 405, at 62 (stating "[t]he general consensus is that Arizona's environmental and land conservation community was not prepared to wage the knock-down fight that proponents brought to the state").

438. The Idaho legislature adopted House Bill 555 in March 2006. Limitation on Eminent Domain for Private Parties, Urban Renewal or Economic Development Purposes, 2006 Idaho Sess. Laws 96 (codified at IDAHO CODE ANN. § 7-701A) (announcing adoption of House Bill 555)). The bill provided that "[e]minent domain shall not be used to acquire private property . . . [f]or any alleged public use which is merely a pretext for the transfer of the condemned property to or any interest in that property to a private party; or . . . for the purpose of promoting . . . economic development." IDAHO CODE ANN. § 7-701A(2)(a)-(b) (2007). As opponents of the measure—who included Idaho's governor—pointed out, Proposition 2's eminent domain provisions were taken nearly verbatim from the already-enacted legislation. *See* Lora Volkert, *Idaho Governor Against Proposition 2*, IDAHO BUS. REV., Oct. 16, 2006 (citing Gov. Jim Risch's opposition to the proposition and suggesting that its eminent domain measures were redundant).

439. Rocky Barker, *Opposition Groups Close to Matching Prop 2 Support Funds*, IDAHO STATESMAN, Nov. 2, 2006, at 2 (noting that at that time proponents had raised about $810,000, the vast majority from Howard Rich, while opponents had raised about $755,000).

440. *See* Ray Ring, *The West: A New Center of Power*, HIGH COUNTRY NEWS (Paonia, Colorado), Nov. 27, 2006, at 10 (describing defeat of Idaho Proposition 2); Lora Volkert, *Idaho Voters Kill Proposition* 2, IDAHO BUS, REV., Nov. 13, 2006 (same); Bruce Ramsey, Editorial, *Despite Losses, Property-rights Fight is Far From Over*, SEATTLE TIMES, Nov. 15, 2006, at B6 (noting that the chamber of commerce and realtor groups opposed the measure, although most funding came from environmental groups); Volkert, *supra* note 438 (noting that Idaho Association of Realtors opposed the proposition). These broad coalitions may have resulted from the measures' combination of eminent domain reform (which business organizations and developers who can profit from private-to-private condemnations, opposed) and regulatory takings reform (which environmentalists opposed).

as spokespeople.[441] The coalition also managed to successfully depict the initiative's proponents as wealthy out-of-state opportunists, funded by a wealthy New Yorker for "greedy purposes."[442] The initiative's proponents, led by "This House Is My Home,"[443] on the other hand, never really got a campaign going.[444]

In California and Washington, where the outcome was much closer,[445] observers attributed the defeat of the ballot measures to the opponents' ability to raise more money, build effective coalitions and advertise effectively, as well as to voter wariness about the measures' potential consequences. In both California and Washington, the opponents of the initiatives raised significantly more money than the proponents and vastly outspent the proponents in advertising.[446] In addition to money and an effective advertising campaign, observers attributed defeat of the measure in California, as in Idaho, to the breadth of the coalition against the measure[447] as well as the governor's opposition.[448] Observers attributed the defeat of Initiative 933 in Washington to an effective advertising

441. Ring, *supra* note 440, at 10.

442. Ramsey, *supra* note 440, at B6.

443. Office of the Idaho Secretary of State, Idaho Voters' Pamphlet, November 7, 2006, Argument in Favor, *available at* http://www.idsos.state.id.us/elect/inits/06prp2yes.html (last visited Nov. 9, 2007). Interestingly, the link to "This House Is My Home" from the online voters' pamphlet leads directly to the website of Howard Rich's national libertarian group, Americans For Limited Government, http://getliberty.org/. *Id.*

444. *See* Ramsey, *supra* note 440, at B6 (noting lack of cohesive campaign to promote measure and lack of politically well-known sponsor).

445. *See* California Proposition 90, *supra* note 415. In California, where Proposition 90 lost by a close margin of 52.5 percent to 47.5 percent, new property rights measures closely resembling the defeated measure have already been proposed for the 2008 ballot. *See* Harrison Sheppard, *Taxpayer Advocates Launch New Measure*, CONTRA COSTA TIMES, Nov. 25, 2006, at F4 (discussing Prop. 90-like property rights measure proposed for 2008 ballot); Paul Shigley, *Eminent Domain Reform on Horizon: Local Government, Environmentalists Seek to Frame Issue in New Way*, CA. PLANNING & DEV. REP, Jan. 2007, at 1 (same); *Property Rights Back on Radar*, APPEAL-DEMOCRAT (Marysville, CA), Mar. 24, 2007 (discussing various groups' strategies for 2008 property rights ballot initiative).

446. *See* William Fulton, *Despite Defeat of Prop 90, More Voting On Land Use Restrictions Is Likely* (CALIFORNIA PLANNING & DEVELOPMENT REPORT), Dec. 2006, at 1 (reporting that in California, proponents spent $4 million and opponents spent $11 million and that most of the opponents' money was spent on last-minute add campaigns and attributing defeat of the measure to those largely unanswered adds); Eric Pryne, *Your Guide to Initiative 933*, SEATTLE TIMES, Oct. 16, 2006, at A8 (reporting that in Washington, the opponents raised three times as much money as the proponents of Initiative 933, and that the proponents spent most of their money on the collection of signatures necessary to get the initiative on the ballot, while the opponents spent most of their money on advertising); Ramsey, *supra* note 440, at B6 (reporting that in both Washington and California opponents of the ballot measures outspent the proponents "10-to-1 on ads").

447. Fulton, *supra* note 446, at 1 (observing that the coalition included the Chamber of Commerce, Farm Bureau and California Taxpayers Association as well as environmentalists).

448. Shigley, *supra* note 445, at 1 (noting that Gov. Schwarzenegger opposed the measure).

campaign by the opposition[449] and to discontent with Measure 37 from neighboring Oregonian voters.[450]

VI. THE 2007 AMENDMENTS AND THE PASSAGE OF MEASURE 49

Since its passage, Measure 37 has produced thousands of claims for compensation, hundreds of lawsuits,[451] and ceaseless controversy. As of April 2007, Oregonians had filed approximately 7,560 Measure 37 claims, covering over 750,000 acres and seeking over $10.4 billion in compensation.[452] Over 60 percent of these claims were for farm or forest land, and about 33 percent sought subdivision of the land into four or more home sites.[453] Nearly half of all Measure 37 claims were filed dur-

449. *See* Sarah Mirk, *Defeating I-933*, THE STRANGER, August 8, 2006, at 12 (discussing how opponents of Initiative 933 tried "not to make the same cerebral mistake" as Measure 37's opponents and instead focused on "easy-to-understand, practical reasons for land regulation," focusing on the outcome of the measure, including more traffic and gravel mines in the neighborhood).

450. *See* Dolesh & Vaira, *supra* note 405, at 1 (citing discontent among Oregon voters as a possible influence on Washington voters).

451. The press has reported that there are between 135 and 200 pending Measure 37-related cases in Oregon courts. *See* Laura Oppenheimer, *Bipartisan Fix Emerges to Smooth Measure 37*, OREGONIAN, Mar. 30, 2007, at C1 (reporting the filing of "hundreds of lawsuits"); *Legislature Must Address Measure 37*, CAPITAL PRESS (Salem, Or.), Mar. 16, 2007, *available at* http://oregonpublicinvestment.com/pdfs-media/CapitalPress_3-16-07_002.pdf (reporting that currently 135 Measure 37-related cases have been filed in Oregon courts); Randi Bjornstad, *Measure 37 Revisions Clear House*, REGISTER-GUARD (Eugene, Or.), May 5, 2007, at A11 (reporting that Measure 37 "has spawned upward of 200 lawsuits"). The Oregon Department of Justice website lists over 240 Measure 37-related lawsuits in which the state is a party. Oregon Department of Justice, Pending Measure 37 Litigation list, www.doj.state.or.us/hot_topics/measure37litigation.shtml.

452. *See* SHEILA A. MARTIN ET AL., WHAT IS DRIVING MEASURE 37 CLAIMS IN OREGON?, (INSTITUTE OF PORTLAND METROPOLITAN STUDIES, PORTLAND STATE UNIVERSITY) (2007), http://www.pdx.edu/media/i/m/ims_M37April07UAAppt.pdf (presenting statistics from a Portland State University study of Measure 37 claims in power-point); Oregon Department of Land Conservation and Development, DLCD Measure 37, Summaries of Claims Filed in the State, www.oregon.gov/lcd/measure37/summaries_of_claims.shtml#summaries_of_claims_filed_in_the_state (last visited Nov. 9, 2007) [hereinafter Summaries] (giving statistics, stating that DLCD had received 6,749 Measure 37 claims as of May 25, 2007 requesting over $19 billion in compensation); *Deadline for Processing M37 Claims Extended*, PORTLAND BUS. J., May 10, 2007 [hereinafter *Deadline*] (giving statistics, stating without attribution, that claims are for $17 billion). Measure 37 created a two year deadline for claims based on land use laws enacted prior to the measure's effective date, December 4, 2004. OR. REV. STAT. § 197.352(5) (2005).

453. *See* Martin et al., *supra* note 452 (presenting statistics; percentages refer to both number of claims and acreage); Bruce Pokarney, *Measure 37 & Agriculture: ODA Maps Impacts*, OREGON INSIDER, Feb. 2007, at 14 (discussing statistics of Measure 37 claims for agricultural land, stating that in the Willamette Valley, "51.1 percent of all Measure 37 acres currently in development claims (132,346 acres) involve land zoned for agriculture," which represents "[a]bout 8.8 percent of the valley's agricultural-zoned, privately owned land"); Eric Mortenson, *Uproar in Yamhill County*, OREGONIAN, May 31, 2007, at 10 (describing the process by which Yamhill County, one of the top five agricultural production counties in Oregon and a county on the boundary of urban development, processed Measure 37 claims; noting that the county commission approved claims by owners who owned land prior to the enactment of land use law "in a rubber stamp fashion," had approved 443 claims, affecting approximately 33,000 acres, or 8% of the county's land mass, and denied only 33 claims, but also reporting that, while many claims had been approved, very few actual houses had been built on Measure 37 land); *see also* SHEILA A. MARTIN & KATIE SHRIVER, DOCUMENTING THE IMPACT OF MEASURE 37: SELECTED CASE STUDIES (INSTITUTE OF PORTLAND METROPOLITAN STUDIES, PORTLAND STATE UNIVERSITY) (2006), *available at* http://www.pdx.edu/media/i/m/ims_M37brainerdreport.pdf (providing a detailed description of ten individual Measure 37 claims and an analysis of their impacts on the residential neighborhoods in

ing the month preceding December 4, 2006, the measure's deadline for filing claims based on land use laws passed prior to the measure's effective date.[454] These last-minute claims included several large claims by timber companies.[455] Governments that have processed this deluge of Measure 37 claims have nearly universally waived offending land use regulations rather than pay compensation to the claimants.[456]

Anecdotal evidence[457] and two 2007 polls indicated that a majority of Oregon voters favored amending or revising Measure 37[458] and pres-

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which the claims were made, on farm and forest lands, and on state and local implementation of land use policy).

454. *See* Summaries, *supra* note 452 (stating that 3,570 claims were received between November 13 and December 4, 2006); MARTIN ET AL., *supra* note 453 (showing that PSU survey showed approximately 2000 claims were filed in the last month); *Deadline, supra* note 452 (stating that 3500 claims were filed in the final month).

455. Laura Oppenheimer & Richard Cockle, *Measure 37 Claims Beat Deadline*, OREGONIAN, Dec. 2, 2006, at E1 (reporting that Plumb Creek Timber Co. made more than 100 claims covering 32,000 acres and demanding $94.8 million in compensation; discussing other timber company claims). *See generally* Laura Oppenheimer, *Buy a Slice of Oregon, Complete with Forest View*, OREGONIAN, Dec. 26, 2006 (discussing timber claims); Laura Oppenheimer, *For Sale Signs Sprouting Where Timber Once Stood*, OREGONIAN, Dec. 26, 2006 (same); Laura Oppenheimer, *Profit, Ideology Mix For Some Measure 37 Donors*, OREGONIAN, Apr. 23, 2007 (noting overlap between Measure 37 campaign donors and Measure 37 claimants and citing as an example Portland-based Stimson Lumber Company, which donated $30,000 to the Measure 37 campaign and now had Measure 37 claims on 52,000 acres of its land); Laura Oppenheimer, *Forests Stir Land-Use Stew*, OREGONIAN, Jan. 26, 2007, at B1 (reporting that more than half of Stimson's claims ask the government to waive a rule requiring landowners to earn a certain forestry income to build a house and that most remaining claims would revert to lots of 20 or 40 acres, rather than keeping land in larger parcels); Editorial, *Revisit Measure 37 (Primary Beneficiaries Aren't "Mom and Pop")*, REGISTER-GUARD (Eugene, Or), Dec. 6, 2006, at A12 (reporting on large Measure 37 claims filed by: Plum Creek Timber Co. (22,000 acres in Lincoln County and 10,000 acres in Coos County); Lone Rock Timberland Co. (proposal to develop 730 acres of forested land near Camp Creek in Lane County); Wildish Land Co. (proposal to develop 1,200 acres it owns along the Willamette River near Mount Pisgah if the county does not agree to purchase it as park land for $26 million); and Stimson Lumber).

456. *See, e.g.*, Mortenson, *supra* note 453, at 10 (noting that Yamhill County invariably waives the land use law that is the subject of a successful Measure 37 claim rather than pay compensation); Matthew Preusch, *Prineville Offers Measure 37 Pay*, OREGONIAN, Oct. 26, 2006, at A1 (reporting that of the 1500 claims processed as of the time of the article, all governments had waived the offending land use law rather than pay compensation except the town of Prineville, which offered to pay a landowner rather than waive the land use rule, an offer which the landowner rejected).

457. *See, e.g.*, SIGHTLINE INSTITUTE, TWO YEARS OF MEASURE 37: OREGON'S PROPERTY WRONGS (2007), *available at* http://www.sightline.org/research/sprawl/res_pubs/property-fairness/measure-37-report/two-years-m37-report (discussing individual landowners' discontent with Measure 37 and giving anecdotes of Measure 37 claims for mining in the Newburg Crater national monument and subdivisions on farmland); MARTIN & SHRIVER, *supra* note 453, at 3 (presenting case studies of several Measure 37 claims).

458. One poll showed that 20% of Oregon voters thought the measure should be repealed and 49% thought the measure was flawed and should be fixed as soon as possible, while only 19% approved of Measure 37 as written. Memorandum from David Metz, Fairbank, Maslin, Maullin & Associates, to Opportunity PAC II, Regarding Summary of Key Findings from Oregon Statewide Voter Survey (Mar. 16, 2007), *available at* http://www.friends.org/issues/M37/documents/040307_OregonStatewideVoterSurvey.pdf (summarizing results of a telephone poll of 600 Oregon voters). The poll results showed that large majority of voters supported strict requirements for landowners to document the lost value of their property, allowing property owners to build up to three houses on their land, and continuing to limit commercial development and subdivisions of farm and forest land. Results of an earlier poll showed 61% of Oregon voters in favor of either repealing or fixing Measure 37. *See* Press Release, 1000 Friends of Oregon, Oregonians Change Attitudes on Measure 37 (Feb, 8, 2007), *available at* http://www.sightline.org/research/sprawl/

sured the legislature to consider amendments to the measure.[459] In response, the Oregon legislature made Measure 37 amendments a priority during the 2007 legislative session.[460] As a first step, the legislature adopted House Bill 3546,[461] which the governor signed into law on May 10, 2007.[462] The bill offered governments an extension for adjudicating pending Measure 37 claims: For any claim filed after November 1, 2007, governments have 540 days from the filing date to adjudicate the claims, rather than the 180 days allowed under the original measure.[463]

The legislature also enacted House Bill 3540,[464] which referred to the state's voters—through Ballot Measure 49—a twenty-one page comprehensive revision of Measure 37.[465] Adopted by the voters on Novem-

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res_pubs/property-fairness/m37-report-press-release (summarizing results of a telephone poll of 500 Oregon voters); Randi Bjornstad, *Poll Shows Voters Want Land Use Law Changed*, REGISTER-GUARD (Eugene, Or.), Feb. 9, 2007, at D1 (discussing January poll).

Oregonians In Action, however, sites polls showing that voters remain in favor of Measure 37 as it is written. *See* Oregonians In Action, Ballot Measure 37, Question & Answers, Question No. 32, www.measure37. com/measure%2037/faq.htm (last visited Nov. 9, 2007) (citing competing polls).

459. Laura Oppenheimer, *Hundreds Turn Out To Give Their 2 Cents on Measure 37*, OREGONIAN, Apr. 18, 2007, at D4 (reporting large turnout for legislative hearings on Measure 37); Laura Oppenheimer, *Public Demands Land-Use Clarity*, OREGONIAN, Feb. 23, 2007, at A1 (reporting that "Oregonians are so upset about state land-use laws that they've been flooding the Capitol this month to deliver the kind of angry, pleading and tearful speeches you'd expect on abortion and same-sex marriage.").

460. *See, e.g.*, Michelle Cole, *For Many, 2007 Legislature is "Golden Chance,"* OREGONIAN, Jan. 7, 2007, at A10 (discussing legislature's realization that it must address Measure 37 during the 2007 session).

461. H.B. 3546, 74th Leg., Reg. Sess. § 2(2)(a) (Or. 2007), *available at* http://www.leg.state.or.us/07reg/measpdf/hb3500.dir/hb3546.b.pdf (last visited Nov. 9, 2007).

462. *See Deadline*, *supra* 452 (noting that the bill was signed into law just days before the deadline for adjudicating the large number of claims filed during the last month before the December 4, 2006 deadline).

463. H.B. 3546 (providing that "just compensation under [Measure 37] is due the owner of the property from the public entity only if the land use regulation continues to be enforced against the property 540 days after the Measure 37 claim is made to the public entity"). Measure 37 required governments to compensate property owners for land use restrictions that continued to apply to their property 180 days after they filed their Measure 37 claim. OR. REV. STAT. § 197.352(4) (2005).

H.B. 3546 also provided that if the claimant died before her claim was adjudicated by the government, anyone who acquired the subject property "by devise or by operation of law" could prosecute the Measure 37 claim. Or. H.B. 3546.

464. H.B. 3540, 74th Leg., Reg. Sess. (Or. 2007), *available at* http://www.leg.state.or.us/07reg/measpdf/hb3500.dir/hb3540.b.pdf (last visited Nov. 9, 2007). The Oregon House of Representatives passed an earlier version of the bill by a party-line vote of 31 to 24 on May 4, 2007. Laura Oppenheimer, *Measure 37 Election: Emotions Will Flow in Battle Over Rewrite*, OREGONIAN, May 5, 2007, at B01 (noting that "a fall ballot referral cleared its last major obstacle—passing the Oregon House of Representatives in a 31-24 party-line vote"). The Senate revised and passed the bill by a vote of 19-11 along party lines on June 5, 2007, whereupon the House re-passed the bill, as amended, on June 6, 2007 by a party-line vote of 31-26. The bill was filed with the Secretary of State on June 15, 2007. *See* Legislative History of House Bill 3540, *available at* http://www.leg.state.or.us/searchmeas.html (select "house bill" option and enter "3540" in the number field) (last visited Nov. 9, 2007).

465. H.B. 3540, § 25 ("This 2007 Act shall be submitted to the people for their approval or rejection at a special election held throughout this state . . . ."); *see also* Edward Walsh, *Voters Will Decide Hot Issues*, OREGONIAN, July 2, 2007, at B1 (discussing referral of Oregon House Bill 3540 to voters in a special election on November 6, 2007).

On November 6, 2007, by a vote of 61-39 percent (roughly the same margin by which the voters approved Measure 37 three years earlier), the Oregon Electorate ratified Measure 49. Eric Morten-

ber 6, 2007, Measure 49 will curtail some of the most extreme results of Measure 37.[466] For example, it limited Measure 37 claims to situations in which land use laws "restrict the *residential* use of private real property or a farming or forest practice and that reduce the fair market value of the property"—no Measure 37 claim may now accrue for land use laws limiting commercial or industrial uses.[467] Measure 49 also eliminated Measure 37's inheritance right—present owners of property have claims only for land use regulations enacted during their tenure as owners, not that of their ancestors.[468]

Measure 49 established January 1, 2007 as a marker—providing one process of adjudicating claims arising from land use restrictions enacted prior to that date and another procedure for claims based on restrictions enacted after that date.[469] All claims based on land use restrictions enacted prior to January 1, 2007, must have been filed by the date on which the 2007 legislative sessions ended.[470] For these claims, which

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son, *Voters Keep Cigarette Tax As Is But Roll Back Property Rights*, THE OREGONIAN, Nov. 7, 2007.

466. Meaure 49 passed with 718,023 votes for (61.3%) and 437,351 votes against (38.7%), roughly the same margin by which the votes approved Measure 37 three years earlier. *See* Office of the Oregon Secretary of State, Elections Div., Official Results for 2007 November Special Election, *available at* http://www.sos.state.or.us/elections/nov62007/abstract/results.doc.

The version of Oregon House Bill 3540 that originally passed the House would have required a certain quantum of devaluation to trigger compensation. H.B. 3540, § 12(2). Unlike Measure 37, which required government to compensate landowners for *any* reduction in value of their land due to land use regulation, the House version of the Oregon House Bill 3540 would have prospectively required governments to compensate landowners only if a single land use regulation diminished the fair market value of their property by 10 percent, or if multiple land use laws diminished the value of land by 25 percent. *Id.* § 12(2)(b)-(c) (the bill, however, would have required that a farming or forest practice regulation that results in *any* reduction of value gives rise to a compensation claim. *Id.* §§ 12(2)(a). The Senate deleted the triggering provision, and retained Measure 37's provision that any loss in value whatsoever—as calculated according to the provisions of Oregon House Bill 3450—triggers compensation. *Id.* § 12(2).

467. *Id.* § 4(1) (emphasis added) ("If a public entity enacts one or more land use regulations that restrict the *residential* use of private real property or a farming or forest practice and that reduces the fair market value of the property . . . then the owner of the property shall be entitled to just compensation from the public entity that enacted the land use regulation . . . ."); *Id.* § 12(1)(b) (applying to claims filed after the 2007 legislative session; providing that a landowner may apply for compensation only if "the person's desired use of property is residential use or a farming or forest practice").

468. *Id.* § 4(3) (providing that Measure 37's compensation requirement does not apply to "land use regulations that were enacted prior to the claimant's acquisition date . . . ."); *Id.* § 21(1) (providing that "a claimant's acquisition date is the date the claimant became the owner of the property as shown in the deed records of the county in which the property is located"); *Id.* § 21(2) (providing that "[i]f the claimant is the surviving spouse of a person who was the sole owner of the property in fee title at all times during the marriage, the claimant's acquisition date is the date the claimant was married to the deceased spouse or the date the spouse acquired the property, whichever is *later*") (emphasis added); *Id.* § 21(3) (providing that "[i]f a claimant conveyed the property to another person and reacquired the property, whether by foreclosure or otherwise, the claimant's acquisition date is the date the claimant *reacquired* ownership of the property") (emphasis added).

469. *Id.* § 2(13) (defining just compensation under the bill as one remedy for claims based on pre-January 1, 2007 laws and as another for claims based on post-January 1, 2007 laws).

470. *Id.* § 5 (providing that claimants who file claims on or before the adjournment date of the 2007 legislative session are entitled to compensation pursuant to sections 6, 7 or 9 of the bill). This provision effectively extended the original December 2006 filing deadline for claims based on land

include previously approved Measure 37 claims,[471] Measure 49 restricted the number of dwellings successful claimants may build. Claimants owning high value farm- and forestland or groundwater-restricted land are limited to three dwellings,[472] while claimants owning land within urban growth boundaries and on non-high-value land outside urban growth boundaries may obtain waivers to build up to ten dwellings.[473] To obtain waivers for up to three dwellings, claimants need not show that a land use restriction reduced the value of their land, only that land use regulation prohibits establishing a lot, parcel, or dwelling where none did so at the time they acquired their property.[474] To obtain waivers for up to ten dwellings, claimants must make an additional showing of a reduction in property value due to land use regulation using a new formula in House Bill 3540.[475] Measure 49 capped at twenty the number of home sites any owner—whether filing a claim based on a pre- or post- January 1, 2007 land use law—may obtain through Measure 37 waivers, regardless of the number of properties she owns.[476]

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use laws enacted prior to Measure 37 to June 28, 2007—the date on which the 2007 legislature adjourned. *See supra* note 462 (describing effect of the original December deadline).

471. Landowners that have already obtained waivers pursuant to Measure 37 and have acted upon that waiver such that they have a "common law vested right on the effective date of [Oregon House Bill 3540] to complete and continue the use described in the waiver" may continue to take advantage of this waiver, according to the terms of that waiver. H.B. 3540, § 5(3). Other landowners, even those that have obtained waivers, must comply with the limitations Measure 49 places on development. *Id.* §§ 6(2), 7(2), 9(2) (providing that the landowner is entitled to the *lesser* of the dwellings approved under her Measure 37 waiver or the amount allowed under Oregon House Bill 3540). Oregon House Bill 3540 requires DLCD to send to Measure 37 claimants a notice describing how the bill effects their claims. *Id.* § 8.

472. *Id.* §§ 6(1)-(2) (limiting claimants to three home site approvals). The bill further prescribes lot size restrictions for development pursuant to a waiver. *Id.* § 11(3).

473. *Id.* §§ 9(1)-(2), (5)(k), (6) (limiting claimants within an urban growth boundary to ten homesite approvals upon a showing of lost value); *Id.* §§ 7(1), (2), (5)(g) (providing that claimants who own land that is not high value farm land, high value forest land, or groundwater restricted, and who show that the value of three homesites would not recoup the lost value caused by the offending land use regulation, could obtain a waiver for up to ten dwellings). Claimants must choose at the time they file their claim whether to proceed with a claim for three dwellings, or to pursue a claim for up to ten dwellings, with the required showing that three provided inadequate compensation. *Id.* § 8(3) (providing that a claimants must choose to proceed under § 6 (three home-sites) or § 7 (up to ten home-sites)).

474. *Id.* § 6(6) (setting forth qualifications for three-homesite waivers; requiring showing of "one or more land use regulations prohibit establishing the lot, parcel or dwelling" and "on the claimant's acquisition date, the claimant lawfully was permitted to establish at least the number of lots, parcels or dwellings on the property that are authorized under this section [i.e. three]").

475. *Id.* § 7(5)(g) (for non-high-value land outside an urban growth boundary, providing that, in addition to the showings required to obtain a three-homesite waiver, claimants must show that "the enactment of one or more land use regulations . . . that are the basis for the claim caused a reduction in the fair market value of the property that is equal to or greater than the fair market value of the home site approvals that may be established under [the 10-homesite provision] . . . ."); *Id.* at § 9(5)(g) (saying same as § 7(5)(g), but for land within urban growth boundary); *Id.* § 7(6) (providing formula for measuring lost value for non-high-value land outside an urban growth boundary—which is measured as the "decrease, if any, in the fair market value of the property from the date that is one year before the enactment of the land use regulation to the date that is one year after the enactment, plus interest"); *Id.* § 9(6) (same, for land within urban growth boundary).

476. *Id.* § 11(5).

For prospective claims based on land use regulations enacted after January 1, 2007, Measure 49 is less restrictive. While claims still accrue only when land use laws restrict residential use or farming or forestry uses of land, there is no express limit—other than the overall twenty-homesite cap[477]—to the number of dwellings on a successful claimant's property.[478] Instead, claimants are entitled to compensation for the reduction in fair market value of the property, as measured according to the formula established by the bill,[479] or a waiver to use the property "without application of the land use regulation to the extent necessary to offset the reduction in the fair market value of the property."[480] Claimants must file their claims within five years of the offending regulation's enactment.[481]

Other significant changes Measure 49 made to Measure 37 include: (1) allowing waivers to be transferred upon the sale of the property,[482] (2)

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477. *Id.*

478. *Id.* §§ 4(1), 12(1)(b).

479. *Id.* § 12(2) (setting forth methodology for determining valuation). The formula for prospective claims is the same as that set out in sections 7(6) and 9(6) for the ten-homesite retrospective claims: a claimant must show a the "decrease . . . in the fair market value of the property from the date that is one year before the enactment of the land use regulation to the date that is one year after the enactment." *Id.* At least one commentator has noted that HB 3540's valuation methodology might avoid some of the windfall gains to successful claimants created by Measure 37. *See* JOHN D. ECHEVERRIA, ANALYSIS OF OREGON HOUSE BILL 3540/MEASURE 49 (GEORGETOWN ENVIRONMENTAL LAW & POLICY INSTITUTE) 7-9 (2007) (on file with authors). Professor Echeverria argued that, "by comparing the value of property prior to the adoption of a regulation with the value of property after the adoption of the regulation, the [House Bill 3540] calculation should capture, at least to some degree, both the positive and negative effects of a change in regulatory policy." *Id.* at 7. Measure 37's method of determining value lost as a result of land use restrictions—which simply compared the value of land with the land use restriction and the value of land without such restriction—was susceptible to providing windfall gains to landowners by compensating them for the value created by freeing their land from regulation while continuing to regulate their neighbors' land, which is not the same as value lost as a result of regulation. *Id.* at 6; *see also supra* note 162 (discussing criticisms of Measure 37 valuation methodology). Professor Echeverria criticized HB 3540's valuation method on the grounds that it: (i) is—like Measure 37—based on the "mistaken premise that no regulation can legitimately have an adverse effect on value, no matter how modest"; (ii) fails to subtract out market effects on value other than those caused by land use regulation; (iii) requires claimants to establish the reduction in value of their property caused by the enactment, not the application, of the land use restriction, which is difficult to measure and may lead to unreliable results; and (iv) allows for different market appraisal techniques, "notoriously subject to manipulation," in fixing lost value. *Id.* at 8. Ultimately, Professor Echeverria concluded that "all of these considerations combine to make it difficult to predict how HB 3540 would affect potential future regulatory programs." *Id.* at 9.

480. H.B. 3540, §§ 12(4)(a), (b). This differs from Measure 37's provision, which allowed government to "modify, remove, or not to [sic] apply the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property." Measure 37, *supra* note 1, at § 8. House Bill 3540 provides that government may issue a waiver only "to the extent necessary to offset the reduction in fair market value of the property." H.B. 3540, §§ 12(4)(b), (5)(b). As one prominent commentator has noted, HB 3540's provision may allow government to limit the scope of waivers they grant future claimants. *See* ECHEVERRIA, *supra* note 479, at 6, 10.

481. H.B. 3540, § 13(4).

482. *Id.* § 11(6). The transferee must exercise her development right within ten years of the transfer. *Id.*

establishing specific criteria for determining fair market value,[483] (3) clarifying what constitutes a "land use regulation,"[484] (4) specifying that the governing body that *enacted* the land use regulation was responsible for compensation,[485] (5) creating an express cause of action for neighboring landowners adversely affected by Measure 37 decisions,[486] and (6) requiring the governor to appoint an ombudsman to "analyze problems of land use planning, real property law and real property valuation and facilitate resolution of complex disputes."[487] Measure 49 also prospectively narrowed several of the exceptions to Measure 37: The health and safety exception will not apply to future regulation of agriculture and forest practices unless the "primary purpose" of the regulation was to protect human health and safety,[488] and the exception of regulations designed to comply with federal law will not apply to any future regulation of agriculture or forest practices unless the government enacting the regulation has "no discretion" to decline to comply.[489] However, Measure 49 left unchanged Measure 37's provision excepting from compensation those land use regulations prohibiting pornographic activities or restricting activities "commonly and historically recognized as public nuisances under common law."[490]

On balance, Measure 37 was, at most, an imperfect compromise.[491] On the one hand, it limited Measure 37's worst excesses by (1) restricting compensation (and waivers) to landowners affected by land use laws restricting residences, thereby eliminating the use of Measure 37 for in-

483. *Id.* §§ 7(6), (7), 12(2) (setting forth a valuation system, measuring loss of value by comparing the value of the land one year prior to the enactment of the land use law with the value of the land one year after its enactment).

484. *Id.* § 2(14) (listing specific provisions in the land use code, local comprehensive plans, forestry and agricultural regulations, LCDC rules and goals).

485. *Id.* § 4(6) (amending Measure 37 to provide "[t]he public entity that enacted the land use regulation that gives rise to the claim . . . shall provide just compensation").

486. *Id.* § 16 (providing that not only Measure 37 claimants, but also adversely affected persons "who timely submitted written evidence, arguments or comments to a public entity concerning the [Measure 37] determination" with a cause of action to seek judicial review of the determination).

487. *Id.* § 17.

488. *Id.* § 4(4)(b) (providing that public health and safety exception "does not apply to any farming or forest practice regulation that is enacted after January 1,2007, unless the primary purpose of the regulation is the protection of human health and safety").

489. *Id.* § 4(4)(c) (providing that the exception for land use regulations required to comply with federal law "does not apply to any farming or forest practice regulation that is enacted after January 1, 2007, unless the public entity enacting the regulation has no discretion under federal law to decline to enact the regulation").

490. *Id.* §§ 4(3)(a), (c), (d).

491. As Professor Echeverria has pointed out, the compromise satisfies two of the most powerful interest groups in the Measure 37 debate—1000 Friends of Oregon, which advocates for protection of rural land and headed up opposition to original Measure 37, and the timber industry, the group that provided most of the financial backing for the pro-Measure 37 campaign in an effort to curtail the state from further regulating forest practices. *See* ECHEVERRIA, *supra* note 479, at 8-9. Measure 49 responded to the former by restoring most, but not all, of the pre-Measure 37 restrictions on development of the state's agricultural and forest land base. *Id.* And Measure 49 accomodated the latter by making future restrictions of forest practices (along with restrictions of residential development and agriculture) compensable, thereby granting the timber industry immunity from future regulation of forest practices. *Id.*

dustrial or commercial development waivers, (2) eliminating the inheritance right, and (3) curtailing the number of housing sites to which Measure 37 claimants are entitled.[492] As one observer put it, Measure 37 went "a long way toward restoring restrictions on development of Oregon's farm and forest lands that were in place for 30-plus years prior to the adoption of Measure 37."[493] On the other hand, Measure 49 retained, at least to a large extent, the promise at the heart of Measure 37—entitling landowners to compensation for loss of value or a regulatory waiver when a government enacts a regulation restricting residential development, agriculture, or forestry practices—thereby curtailing governmental ability to manage future growth.[494]

CONCLUSION

Even though Oregon voters decided to amend Measure 37 by enacting Measure 49, Measure 37 will continue to have profound effects on the Oregon landscape and on the nature of property rights in the state. Measure 37 reflected an assumption by a majority of the Oregon electorate that the state's land use regulations had unfairly intruded on landowner development rights, at least on those landowners who acquired their land before the regulations. The political campaign which succeeded in passing Measure 37 emphasized the lost development rights of elderly widows and small landowners,[495] but the language of the measure was not limited to small developments,[496] and consequently many large-scale claims were filed.[497] Under Measure 49 those large-scale developments will no longer be possible, since Measure 37 is now restricted to relatively small developments.[498]

Although Measure 37's proponents heralded it as a compensation measure, in application the measure has produced no compensation payments. Instead, fiscally-strapped Oregon governments have uniformly waived regulatory requirements rather than pay compensation.[499] Thus, there have been neither challenges over the amount of compensation due

492. H.B. 3540, § 4(1) (residential and farm or forest practices); § 4(3) (eliminating inheritance right); §§ 11(5), 7(1), (2), (5)(g), 9(1)-(2) (restricting number of dwellings for claimants with claims based on pre-January 1, 2007 claims).

493. ECHEVERRIA, *supra* note 479, at 9.

494. H.B. 3540, §§ 12(4)(a), (b). A government that in 2008 enacted a law increasing minimum lot sizes, for instance, would be required to compensate (or waive the law) all affected landowners who acquired their property prior to the enactment and who could show diminution in value. *Id.* Professor Echeverria has predicted that "the most important effect of revised Measure 37 is probably that it would discourage state and local officials from adopting new land use regulations affecting residential or farm or agricultural [or forestry] practices" because "[i]n simple terms, government officials would see no advantage in investigating resources and political capital in developing and adopting new regulations if they would then be forced to issue numerous waivers." ECHEVERRIA, *supra* note 479, at 11.

495. *See supra* notes 145-47 and accompanying text.

496. *See supra* notes 150-61 and accompanying text.

497. *See supra* notes 451-55 and accompanying text.

498. *See supra* notes 464-94 and accompanying text.

499. *See supra* note 456 and accompanying text.

nor claims that the effect of regulation was to add value, not reduce it. In effect, Measure 37 has operated as a large-scale deregulatory measure, repealing land use regulations for select landowners.

The wisdom of this deregulation initiative is certainly open to question. Measure 37 is a planner's nightmare, as it awards development rights on the basis of duration of ownership, not suitability to location or compatibility with a neighborhood. Moreover, its premise that development rights are fundamental property rights has never been accepted as dominant in Anglo-American law. Development rights have always been cabined by the maxim of *sic utere tuo ut non laedas*[500]—the "do no harm" rule. As Chief Justice Lemuel Shaw of the Supreme Judicial Court of Massachusetts memorably phrased it over a century-and-a-half ago:

> We think it is a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth...is derived directly or indirectly from the government, and is held subject to those general regulations, which are necessary to the common good and general welfare. Rights of property...are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to reasonable restraints and regulation established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.[501]

One way to explain Measure 37 is that the Oregon electorate redefined the "do no harm" rule so as provide compensation or regulatory waivers to certain landowners whose land acquisition antedated regulation. In so doing, the electorate chose to define "reasonable" land use so as to make duration of ownership determinative rather than adverse effects on neighbors or ecological damage. Whether this choice was a wise one in an increasingly interconnected, carbon-limited world is for other jurisdictions to evaluate. And in fact Oregon voters decided to curb the scope of Measure 37 rights in recognition of their costs on third parties and the environment.[502]

Another way to explain Measure 37 is that Oregon voters decided, that the fetters the state's land use system placed on certain landowners' development rights were inconsistent with ordinary notions of the moral

500. Or use your property as not to injure that of another's. *See* JEREMY BENTHAM, PRINCIPLES OF THE CIVIL CODE ch. 13, n. 1 (1843), *available at* http://www.la.utexas.edu/research/poltheory/bentham/pcc/index.html.

501. Commonwealth v. Alger, 61 Mass. 53, 84-85 (Mass. 1851).

502. *See supra* notes 464-94 and accompanying text.

dimension of property rights.[503] This interpretation would also account for Measure 49's reduction in the scope of Measure 37 rights to small developments, rectifying the perceived unfairness of alleged overregulation. To the extent that Measure 37 is explainable on fairness grounds—and not on a deregulatory effort phrased in fairness terms—Measure 49 may seem to be a suitable—albeit imperfect[504]—antidote.

But perhaps the most telling way to understand Measure 37 is that the Oregon electorate was sympathetic to the notion that development rights *were* the equivalent of property rights. And that these development rights existed in the abstract, regardless of the geographic or environmental context of their exercise. However ahistorical, or out of touch with the complexities of the twenty-first century,[505] or inconsistent with sophisticated definitions of what property rights actually entail,[506] or in conflict with contemporary concerns over urban sprawl or carbon emissions, this abstract vision of property rights as equivalent to development rights apparently resonated with Oregon (and, apparently, Arizona) voters.

An abstract vision of property prevailed in the late nineteenth and early twentieth centuries, leading to decisions like *Lochner v. New York*,[507] a result now widely reviled.[508] Measure 37 (and its ensuing adoption in Arizona[509]) may reflect a revival of interest in viewing development rights as idealized abstractions that are fundamental, regardless of their context. The costs of such abstractionism will eventually become evident to Oregonians, although perhaps not in the short run. But Measure 37's readjustment of property rights will surely serve as a laboratory for other jurisdictions, which also grapple with what a century-and-a-half ago Justice Shaw described as the effort in a "well ordered civil society" to avoid "injurious" uses, including those adversely affecting neighbors and "the rights of the community."[510] The challenge

503. *See* Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1850 (2007); *see also* BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 10-15, 97-100 (1977) (noting the power of the "ordinary observer's" definition of property).

504. *See* ECHEVERRIA, *supra* note 479, at 10-11 (noting that under an amended Measure 37, state and local governments would still routinely choose to waive regulatory requirements, rather than pay compensation, and that new land use regulations would be chilled).

505. *See generally* FREYFOGLE, *supra* note 17.

506. *See* ACKERMAN, *supra* note 503, at 10-15 (distinguishing a "Scientific Policy Maker" from an "Ordinary Observer").

507. 198 U.S. 45, 52-53 (1905) (striking down a New York statute setting maximum hours for bakers as inconsistent with the freedom of contract guaranteed by the due process clause of the Fourteenth Amendment).

508. *See, e.g.*, LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 8-5-8-6 (3rd ed. 2000) (discussing the demise of *Lochner's* vision of substantive due process review of the merits of socio-economic legislation).

509. *See supra* notes 427-33 and accompanying text.

510. Commonwealth v. Alger, 61 Mass. 53, 84-85 (Mass. 1851); *see also supra* note 501 and accompanying text.

of the future will be to ascertain whether the radical changes in development rights ushered in by Measure 37 and its copycats are an accurate reflection of the morality of property rights of the twenty-first century.

DISQUALIFYING A DISTRICT ATTORNEY WHEN A GOVERNMENT WITNESS WAS ONCE THE DISTRICT ATTORNEY'S CLIENT: THE LAW BETWEEN THE COURTS AND THE STATE

ELI WALD†

INTRODUCTION

Should a district attorney be disqualified from a criminal case if a prosecution witness is a former client of the district attorney?[1] Although there has been significant academic, legislative and judicial attention to disqualification of district attorneys in general,[2] and to disqualification of district attorneys who represented the defendant in particular,[3] a prosecu-

† Assistant Professor, University of Denver Sturm College of Law; B.A., Tel-Aviv University; LL.B., Tel-Aviv University; LL.M., Harvard Law School (waived); S.J.D., Harvard Law School. I thank Arthur Best, Erik Lemmon and Kris Miccio for their useful comments and Bryce Ilvonen and University of Denver Sturm College of Law research librarian Diane Burkhardt for their research assistance. This article explores grounds for disqualification of district attorneys, among them personal and financial conflicts of interest. It thus seems appropriate to disclose my own "interest" in the subject matter addressed in this article: I served as a paid expert witness in *People v. Lincoln*, a case the article explores in detail and testified for the defense arguing that Colorado law allows in some circumstances for the disqualification of a district attorney who represented a former-client-turned-witness for the government. On the duty to disclose possible conflicts or factors potentially effecting scholarship, see Graham Brown, *Should Law Professors Practice What They Teach?* 42 S. TEX. L. REV. 316 (2001); Richard Lippitt, *Intellectual Honesty, Industry and Interest Sponsored Professional Works, and Full Disclosure: Is the Viewpoint Earning the Money, or Is the Money Earning the Viewpoint?* 47 WAYNE L. REV. 1075 (2001); *see also* William Simon, *The Market for Bad Legal Advice: Academic Professional Responsibility Consulting as an Example*, (Columbia Law School Public Law & Legal Theory Working Paper Group, Paper Number 07-158, 2007), *available at* http://ssrn.com/abstract=1025984.

1. Issues of first impression blur the line between positive (what the law is) and normative (what the law should be). *See* Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1231-32 (1987) (summarizing and challenging the positive-normative dichotomy). Because disqualification of district attorneys who represented former-clients-turned-witnesses for the government is an issue of first impression not previously decided, positive law is silent in the sense that it does not clearly allow nor disallow such disqualifications. The question of whether the law should allow for disqualification of district attorneys under such circumstances thus becomes a normative one. *See* Wallace D. Loh, Book Review, *In Quest of Brown's Promise: Social Research and Social Values in School Desegregation*, 58 WASH. L. REV. 129, 165 (1982) (arguing that first impression cases call upon the courts to engage in a jurisprudence of discretion and decide both applicable law and the facts).

2. *See, e.g.*, Abby L. Dennis, Note, *Refining in the Minister of Justice: Prosecutorial Oversight and the Superseder Power*, 57 Duke L. J. 131 (2007). *See generally* ANGELA J. DAVIS, ARBITRARY JUSTICE – THE POWER OF THE AMERICAN PROSECUTOR 123-161 (2007); Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393 (1992) (observing that prosecutors are greatly insulated from judicial control over their conduct); Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WISC. L. REV. 399, 425-27; Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207 (2000).

3. Allan L. Schwartz & Danny R. Veilleux, Annotation, *Disqualification of Prosecuting Attorney in State Criminal Case on Account of Relationship with Accused*, 42 A.L.R. 5th 581, II.A. (1996); *What Circumstances Justify Disqualification of Prosecutor in Federal Criminal Case*, 110

tor's disqualification when a former client becomes a government witness has received no academic attention, has not been addressed by statutes, and has not been decided by courts.[4] Studying the grounds for disqualification of district attorneys whose former clients become government witnesses sheds light on the complex battle between the judiciary and the state for authority and control over the Office of the District Attorney and the criminal justice system.[5]

In this conflict, the judiciary invokes its inherent powers to disqualify district attorneys and the state responds by asserting executive powers and promulgating disqualification statutes asserting exclusive authority. Recognizing the state's immense power and inherent advantage over defendants, the criminal justice system incorporates safeguards, often by means of broad judicial interpretation, to protect the right of the accused to a fair trial.[6] In the context of disqualification of district attorneys, the judiciary's role in expanding and protecting defendants' rights against the state suggests a sympathetic approach towards motions to disqualify district attorneys.[7] However, to further its interest in effective pursuit of law and order, the state may seek to protect the Office of the District Attorney from undue interference. This motivation may lead to a general approach disfavoring disqualification motions and to displeasure with the exercise of judicial inherent powers to disqualify district attorneys.

The issue of disqualification of district attorneys when a former client becomes a government witness thus involves more than balancing the state's interests in administering law and order via the Office of the District Attorney against the interests of defendants and former-clients-

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A.L.R. FED. 523, I.-II. (1992); 63C AM. JUR. 2d Prosecuting Attorneys §§ 26-28, 48 (2007) [hereinafter *Circumstances*].

4. The question did come up as an issue of first impression before a Colorado trial court in the spring of 2007 in the matter of *People v. Lincoln*, 161 P.3d 1274, 1276 (Colo. 2007). The trial court answered the question in the affirmative. *Id.* The state of the law, however, is unclear because the Colorado Supreme Court reversed and remanded without directly addressing the issue. *Id.* at 1282. For a review of the power struggle between the courts and the state over the regulation of the Office of the District Attorney, see generally BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT vi (2d ed. 2005) (lamenting the passivity of the judiciary in overseeing prosecutorial power).

5. In the battle for control over the District Attorney's Office the "state" is represented by both the executive branch and the legislative branch, working together to curb the power of the judiciary and its exercise of inherent powers. To be sure, I do assert this alliance between the executive and legislative branches generally in the context of the criminal justice system, only that the two branches do cooperate in asserting authority over the Office of the District Attorney vis-à-vis the judiciary.

6. The role of the judiciary in safeguarding the rights of the criminal defendant given the power of the state over the accused has been well documented. *See, e.g.*, Jonathan Simon, Book Review, *Why Do You Think They Call It Capital Punishment? Reading the Killing State*, 36 LAW & SOC'Y REV. 783, 795 (2002) (exploring "examples of the Supreme Court expanding the rights of criminal defendants at the expense of state power"); Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205, 1263 (1998) (examining the role of the defense attorney in limiting "the arbitrary exercise of coercive state power by safeguarding the defendant's entitlement to basic . . . rights").

7. For example, disqualification of a district attorney may be ordered as a remedy for prosecutorial misconduct. *See Circumstances*, *supra* note 2, at § 10[a].

turned-witnesses. It provides an opportunity to explore how law is created in the shadow of, and as the result of, the battle between the courts and the state and to appreciate the consequences for parties caught in the crossfire.

Part I of this article explores the doctrine of inherent powers, its use by the judiciary to disqualify district attorneys in the shadow of its relationship with the executive branch, and legislative attempts to abrogate it by means of promulgating disqualification statutes asserting exclusive authority over the regulation of the District Attorney's Office. It asserts that such exclusive provisions are unconstitutional because they violate the separation of powers doctrine and that courts have the inherent power to disqualify a district attorney beyond the authority granted to them by statute. Finally, Part I examines the circumstances under which courts should exercise their inherent power and disqualify a district attorney whose former client is a government witness.

Part II studies disqualification statutes, argues that such statutes should generally be read to allow for the disqualification of a district attorney who represented former-clients-turned-witnesses for the government, and explores the circumstances under which such disqualification would be appropriate. Part III analyzes a recent Colorado case to illustrate that lack of resolution of the issue of disqualification of district attorneys whose former clients become government witnesses has unfortunate consequences for those witnesses, for defendants and for the integrity of the judicial process.

I. COURTS' INHERENT POWER TO DISQUALIFY DISTRICT ATTORNEYS

A. Courts' Inherent Powers – a Doctrine of "Happy Indeterminacy"?

The inherent powers doctrine is a long-established,[8] cumulative,[9] expansive,[10] judicial assertion of possessing the exclusive authority to regulate the practice of law. Analytically, the doctrine consists of two

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8. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS, § 2.2.3, at 27 n.45 (1986) (The first American case commonly cited for asserting the inherent powers doctrine was *In re Mosness*, 39 Wis. 509 (1876)); *see also* Thomas M. Alpert, *The Inherent Power of the Courts to Regulate the Practice of Law: An Historical Analysis*, 32 Buff. L. Rev. 525, 536 (1983).

9. *See id.* § 2.2.1 at 23.

10. Some of the powers claimed by various jurisdictions include the following:

> [T]he power to promulgate an official lawyer's code; to admit lawyers to practice under specified conditions and to disbar or otherwise discipline admitted lawyers; to define the unauthorized practice of law and to fashion remedies to banish nonlawyers from the defined realms of exclusive lawyer practice, even when the assertedly unauthorized practice has nothing to do with court proceedings; to construct an integrated bar of which all lawyers must be members in good standing in order to continue practicing law; to levy an assessment that every lawyer must pay toward support of the court's activities in regulating the legal profession; and to regulate the conduct of judges and to issue and enforce compliance with the Canons of Judicial Ethics.

Id. § 2.2.2 at 24-5; *see also* Note, *The Inherent Power of the Judiciary to Regulate the Practice of Law—A Proposed Delineation*, 60 Minn. L. Rev. 783, 785 (1976) [hereinafter *Delineation*].

steps. First, courts claim that various "'implied,' 'essential,' 'incidental' or 'inherent'"[11] powers are necessary to maintain the integrity of the judicial process.[12] Second, courts invoke the constitutional law separation of powers doctrine to protect their self-proclaimed inherent powers. The separation of powers doctrine, recognized under federal and state law, generally empowers each governmental branch—legislative, executive, and judicial[13]—to act within its prescribed sphere, and states that "no branch may attempt to exercise a power [bestowed] upon [another] branch."[14] Applying the separation of powers doctrine, courts have asserted that any attempt by either the executive or the legislative branch to encroach upon the courts' inherent power to regulate the practice of law was unconstitutional.[15]

Over time, the regulation of the practice of law pursuant to the courts' inherent powers has been recognized as a traditional judicial function.[16] However, the scope of the doctrine and its application are unclear.[17] Indeed, while courts have clearly established their power to regulate the practice of law, their claim to have this power exclusively and the manner in which courts exercise it in particular instances have been greatly challenged. Interestingly, this state of uncertainty is intentional: courts have generally avoided comprehensively addressing all the competing considerations embedded in inherent powers generally and have instead focused "on the individual inherent power involved in each case."[18]

Specifically, in *Link v. Wabash*[19] the Court established the framework for courts' acquiescence to statutory limitations on their inherent powers, holding that a statute will not abrogate an inherent power of the court absent clear legislative intent.[20] In *Chambers v. NASCO, Inc.*,[21] the

11. Henry M. Dowling, *The Inherent Power of the Judiciary*, 21 A.B.A. J. 635, 636 (1935).

12. *See* Comm. on Legal Ethics of W. Va. State Bar v. Ikner, 438 S.E.2d 613, 617 (W. Va. 1993) (quoting *In re Grubb*, 417 S.E.2d 919, 922 (W. Va. 1992) (Generally, courts "have an inherent responsibility under . . . general supervisory powers to preserve the integrity of the judiciary and to maintain the public confidence in our court system.")). Courts possess the power to regulate the practice of law in order to protect the public and to uphold the public confidence in attorney reliability and integrity. *Id.* at 616; *see also Delineation*, *supra* note 10, at 785-86.

13. Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation—The Role of the Inherent-Powers Doctrine*, 12 U. ARK. LITTLE ROCK L.J. 1, 5 (1989).

14. WOLFRAM, *supra* note 8, § 2.2.3 at 27.

15. *Id.*; *see also* Alpert, *supra* note 8, at 525 ("With but few exceptions, the courts have determined that the doctrine of the separation of powers limits or even precludes legislative regulation of this vital profession."); *Delineation*, *supra* note 10, at 785-86.

16. *Id.*; *see also Delineation*, *supra* note 10, at 784 ("Judicial regulation of the legal profession has predominated for many years.").

17. *See, e.g.*, Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 738 (2001) (asserting that the fundamental questions of the source and scope of courts' inherent powers have never been satisfactorily addressed).

18. *Id.* at 739.

19. 370 U.S. 626 (1962).

20. *Id.* at 630-31.

21. 501 U.S. 32 (1991).

Court added that authority granted under a statute only applies to the circumstances specified within it, whereas the inherent powers of the court extend to a full range of circumstances,[22] concluding that even with the grant of statutory power, "inherent power[s] . . . continue to exist to fill in the interstices."[23] Some have celebrated this uncertain state of affairs as one of a "constitutional artistry" and "happy indeterminacy,"[24] arguing that courts have been declining to decide the broader issues embedded in inherent powers, acquiescing to legislation concerning courts' powers and leaving open a zone of undefined judicial discretion in order to avoid direct inter-branch confrontations.[25] Others, however, have critically argued that courts refuse to decide the greater issues because the case-by-case approach allows them to stretch the narrow terms "implied," "essential," "incidental," and "necessary" to rationalize a wide range of actions that are in fact not essential to their exercise of judicial authority.[26]

In any event, and regardless of competing positions regarding the desirability of this state of affairs, the inherent powers doctrine is in disarray with no comprehensive theory regarding its scope and application. On the one hand courts routinely assert the possession of inherent powers and invoke them regularly; and on the other hand courts frequently admonish that such powers must be exercised cautiously,[27] and acquiesce to legislation controlling and restricting their inherent powers.[28] The question becomes, therefore, not whether courts possess inherent powers but whether courts should exercise their inherent powers in a particular instance.[29]

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22. *Id.* at 46.

23. *Id.*

24. Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L. J. 929, 971 (1996).

25. *Id.* at 967-71; *see also* Pushaw, *supra* note 17, at 782-83.

26. Pushaw, *supra* note 17, at 738.

27. *See* Degen v. United States, 517 U.S. 820, 823 (1996) ("Principles of deference counsel restraint in resorting to inherent powers . . . . ").

28. *See, e.g.*, State v. Hoegh, 632 N.W.2d 885, 889 (Iowa 2001) ("We have recognized that some inherent powers may be controlled or restricted by statute. Some inherent powers may even be overridden by statute. Other inherent powers may be so fundamental to the operation of a court that any attempt by the legislature to restrict or divest the court of the power could violate the separation of powers doctrine. (citations omitted)); *see also* Carrington, *supra* note 24, at 967-71.

29. Michael L. Buenger, *Of Money and Judicial Independence: Can Inherent Powers Protect State Courts in Tough Fiscal Times?* 92 KY. L.J. 979, 1049 (2004) ("The question, therefore, is not whether court can exercise this [inherent] power, but rather when they should do so." (alteration in original)). Colorado case law illustrates the indeterminacy: on the one hand, the inherent powers doctrine has been recognized consistently and repeatedly by the Colorado Supreme Court. *See, e.g.*, Pena v. District Court, 681 P.2d 953, 956 (Colo. 1984) ("[The inherent powers of the judiciary include] '[a]ll powers reasonably required to enable a court to perform efficiently its judicial functions, to protect its dignity, independence, and integrity, and to make its lawful actions effective. These powers are inherent in the sense that they exist because the court exists; the court is, therefore it has the powers reasonably required to act as an efficient court.'" (quoting Jim Carrigan, *Inherent Powers and Finance*, TRIAL, Nov.-Dec. 1971, at 22) (alteration in original)). On the other hand, the court has admonished the strict and limited use of inherent powers. *See, e.g.*, *In re* Estate of Myers, 130 P.3d 1023, 1025 (Colo. 2006).

B. Inherent Powers and Disqualification of District Attorneys

The expansive inherent powers doctrine generally encompasses the power to disqualify attorneys.[30] Courts have routinely justified this power on the ground that attorneys are officers of the court,[31] and as such, their conduct directly affects the integrity, efficiency, and public perception of the judiciary.[32] For example, the Colorado Supreme Court has held that inherent powers include the power to disqualify attorneys to preserve the court's integrity.[33]

Courts' inherent powers also include, more specifically, the power to disqualify prosecuting attorneys.[34] That said, courts have been quite reluctant to exercise their power to disqualify district attorneys and quick to follow the *Link* and *Chambers* framework acquiescing to statutes limiting their exercise of inherent power. Reasoning that the function of prosecuting criminal cases has historically been within the province of

30. *See* Hempstead Video, Inc. v. Inc. Vill. of Valley Stream, 409 F.3d 127, 132 (2d Cir. 2005) ("The authority of federal courts to disqualify attorneys derives from their inherent power to "'preserve the integrity of the adversary process'" (quoting Bd. of Educ. v. Nyquist, 590 F.2d 1241, 1246 (2d Cir.1979)); Talecris Biotherapeutics, Inc. v. Baxter Int'l, Inc., 491 F. Supp. 2d 510, 513 (D. Del. 2007) (the court has the power to govern conduct of any attorney appearing before it—including disqualification); Conley v. Chaffinch, 431 F. Supp. 2d 494, 496 (D. Del. 2006) (the court's inherent power to govern attorneys "appearing before it" includes disqualification as a regulatory measure); Roush v. Seagate Technology, LLC, 58 Cal. Rptr. 3d 275, 280 (Cal. Ct. App. 2007) (courts possess inherent power to disqualify attorneys in order to further justice and control officers of the court); Oaks Management Corp. v. Superior Court, 51 Cal. Rptr. 3d 561, 567 (Cal. Ct. App. 2006) (explaining Judge's authority to disqualify attorneys originates from courts' inherent power to further justice and control over those who appear before it).

31. *See* Theard v. United States, 354 U.S. 278, 281 (1957) (upon acceptance as a member of the bar, "[h]e became an officer of the court" (quoting Justice Cardozo in People *ex rel.* Karlin v. Culkin, 248 N.Y. 465, 470-71 (N.Y. 1928))); *see also* Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39 (1989) (examining the dubious meaning of officer of the court with regard to the attorney's roles and responsibilities in contemporary practice realities).

32. *Delineation*, *supra* note 10, at 785; Dowling, *supra* note 11, at 639 ("The court is regularly engaged in administering correct principles of justice and of fair dealing among men . . . ." Consequently, if an attorney disregards the principles of justice, then the court "has the right to discipline the unworthy member, and exclude those who, in contempt of the tribunal, seek to practice law before it without proper admission, or otherwise disparage the court's dignity.").

33. *E.g.*, *Myers*, 130 P.3d at 1025. ("[C]ourts have the inherent power to ensure both the reality and appearance of integrity and fairness in proceedings before them; and to that end, they necessarily retain the discretion to disqualify attorneys from further representation."). Consistent with the "happy indeterminacy" approach, immediately following its affirmation of the inherent power to disqualify attorneys the court admonished its careful use. *Id.*; *see also* People v. Witty, 36 P.3d 69, 73 (Colo. Ct. App. 2000).

34. Rhodes v. Miller, 437 N.E.2d 978, 979-80 (Ind. 1982) ("[A] trial judge does have the authority, and, in fact, the responsibility, to find that a prosecuting attorney, and/or members of his staff, should be disqualified if he finds facts to be true with reference to such disqualification and to then appoint a special prosecuting attorney to try the cause"); Lux v. Commonwealth of Virginia, 484 S.E.2d 145, 149 (Va. Ct. App. 1997) ("In order to protect prosecutorial impartiality, a trial court has the power to disqualify a Commonwealth's attorney from proceeding with a particular criminal prosecution if the trial court determines that the Commonwealth's attorney has an interest pertinent to a defendant's case that may conflict with the Commonwealth's attorney's official duties"); *see also* State v. Culbreath, 30 S.W.3d 309, 313 (Tenn. 2000); Cole v. State, 2 S.W.3d 833, 835 (Mo. Ct. App. 1999); Brown v. Commonwealth of Virginia, 504 S.E.2d 399, 402 (Va. Ct. App. 1998); State v. Copeland, 928 S.W.2d 828, 840 (Mo, 1996).

the executive branch,[35] and that the legislative and executive branches maintain a strong interest in the appointment of and the exercise of authority over district attorneys, courts have concluded that the interest in the appointment and disqualification of district attorneys is and should be shared by all branches of government.[36]

Recent amendments to disqualification statutes, however, seem to have pushed the envelope and crossed the line from sharing authority over the regulation of district attorneys to usurping it. For example, it seems that the Colorado legislature has attempted to abrogate the courts' inherent power to disqualify a district attorney. Colorado Revised Statute section 20-1-107 purports to specify the "only" grounds for which a district attorney may be disqualified.[37]

The statute itself gives ample support for the preemption intent of the Colorado legislature. First, subsection 20-1-107(2) states: "A district attorney may *only* be disqualified in a particular case . . ." and goes on to specify three grounds for disqualification. "Only" is explicitly exclusive and renders *Chambers* meaningless: the authority granted by the Colorado statute does not apply to certain circumstances, rather it purports to exhaustively define all the circumstances permitting disqualification of district attorneys. Further, the exclusive language of the statute makes it clear that the legislature envisions no "interstices" for the courts to fill in. Second, subsection 20-1-107(1) states in relevant part: "The general assembly finds that . . . [it has] the exclusive authority to prescribe the duties of the office of the district attorney . . . ." The exclusivity language suggests that courts do not have authority over the duties of the district attorney and arguably no authority to disqualify a district attorney. Third, subsection 20-1-107(2) states that a disqualification motion shall not be granted unless a court finds one of the three grounds specified in the subsection, once again lending support for the proposition that a court cannot grant a motion and disqualify a district attorney for reasons other than the ones enumerated in the statute. It further restricts the ability of the courts to disqualify a district attorney by mandating an automatic stay of a disqualification order pending a mandatory interlocutory appeal before the Colorado Supreme Court.[38]

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35. *See* United States v. Jacobo-Zavala, 241 F.3d 1009, 1012 (8th Cir. 2001). State v. Hoegh, 632 N.W.2d 885, 889-90 (Iowa 2001) (finding that a statute granting the power of appointment of a special prosecutor to the county board of supervisors, while removing a power from the courts and vesting it in the legislature, did not violate the separation of powers doctrine because the legislature legitimately shared an interest in and responsibility for the regulation of special prosecutors).

36. *Hoegh*, 632 N.W.2d at 889-90 (finding that a statute granting the power of appointment of a special prosecutor to the county board of supervisors, while removing a power from the courts and vesting it in the legislature, did not violate the separation of powers doctrine because the legislature legitimately shared an interest in and responsibility for the regulation of special prosecutors).

37. COLO. REV. STAT. ANN. § 20-1-107 (West 2007).

38. Arguably, by promulgating an open-ended standard of disqualification which calls for judicial interpretation, *see infra* Part II, the legislature left courts ample room in which to exercise

Furthermore, the legislative history suggests that the Colorado legislature amended the statute in 2002 in response to two 2001 decisions. In *City and County of Denver v. County Court*,[39] the Colorado Court of Appeals held that appearance of impropriety alone justifies disqualification of city attorney's office, despite the fact that the term "appearance of impropriety" no longer appeared in a relevant authorizing statute; and in *People v. Palomo*,[40] the Colorado Supreme Court held that appearance of impropriety can be the basis for disqualification of the District Attorney's Office.[41] Both cases found support for the appearance of impropriety as a ground for disqualification in the courts' inherent powers.[42] It seems clear that the Colorado legislature intended to override these decisions.[43] Indeed, the Colorado Supreme Court has found explicitly that the revised statute "eliminates 'appearance of impropriety' as a basis for disqualification of district attorneys."[44]

A narrow interpretation of the statute, according to which it did not intend to abrogate inherent powers but only meant to disallow the appearance of impropriety as an independent ground disqualification is implausible. First, the legislature could have explicitly disallowed the appearance of impropriety as a ground for disqualification rather than specify the "only" grounds, omitting the appearance of impropriety. Second, the "appearance of impropriety" *is*, and means, the courts' invocation of inherent powers.[45] That is, disallowing the appearance of impropriety is tantamount to challenging the courts' inherent power to disqualify a district attorney.

The Colorado legislature is not alone in trying to restrict the courts' inherent power to disqualify district attorneys. Following the California

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power and discretion. The straightforward language of the statute and the legislative history, however, contradict this construction and clarify that the legislature intended to exercise exclusive authority over disqualification of district attorneys.

39. 37 P.3d 453 (Colo. Ct. App. 2001).

40. 31 P.3d 879 (Colo. 2001).

41. *Id.* at 882; *see also* People v. County Court, 854 P.2d 1341 (Colo. Ct. App. 1992) (holding that appearance of impropriety is not only a proper ground for disqualification of a district attorney, it is also a compelling basis for such action).

42. *Palomo*, 31 P.3d 879; People v. County Court, 37 P.3d at 456 ("Whether an attorney should be disqualified is a matter within the discretion of the court").

43. COLO. REV. STAT. ANN. § 20-1-107 (West 2007).

44. People v. Chavez, 139 P.3d 649, 653 (Colo. 2006); People *ex rel.* N.R., 139 P.3d 671, 675 (Colo. 2006) ("We conclude that, in using the word 'only' and defining with specificity the circumstances under which disqualification is proper, the amended version of section 20-1-107 eliminates 'appearance of impropriety' as a basis for disqualification."); People v. Manzanares, 139 P.3d 655, 658 (Colo. 2006); *In re* E.L.T., 139 P.3d 685, 687 (Colo. 2006). It is possible to assert that while the legislature eliminated the appearance of impropriety as an independent ground for disqualification, the appearance of impropriety nevertheless makes a backdoor reentry into the statute because it can be considered as part of "special circumstances" under the statute. Justice Bender explicitly rejects this approach, however, because he believes that the appearance of impropriety is tantamount to courts' inherent powers which exist outside of and in spite of a disqualification statute. *N.R.*, 139 P.3d at 682 (Bender, J., dissenting).

45. *N.R.*, 139 P.3d at 682 (Bender, J., dissenting) ("The phrase 'appearance of impropriety' establishes a nebulous standard, that broadly describes the court's inherent power.").

Supreme Court decision in *People v. Superior Court (Greer)*,[46] the legislature promulgated section 1424 of the California Penal Code, which states in relevant part: "The motion *may not be granted unless* the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial (emphasis added)."[47] In other words, the California legislature seems to have stated the only ground for disqualification of a district attorney because pursuant to the statute a court may not grant a motion to disqualify unless it finds that defendant has met the statutory standard for disqualification.[48]

To the extent they purport to usurp the inherent power of the courts to disqualify a district attorney, both the Colorado and California statutes violate the separation of powers doctrine and are unconstitutional. Exploring the interplay between the judiciary's inherent power and the separation of powers doctrine, Wolfram argues that the inherent powers doctrine consists of two separate aspects—the "affirmative aspect" and the "negative aspect."[49] Courts invoke the affirmative aspect when they hold that they have the inherent authority to regulate attorneys when statutes are silent on the issue.[50] The negative aspect, conversely, arises when courts hold legislative or administrative laws unconstitutional because either the legislative or the executive branch violated the separation of powers doctrine by attempting to regulate attorneys and the practice of law.[51] The negative aspect of the inherent powers doctrine asserts that the courts, and *only* the courts, may regulate attorneys (emphasis added).[52] The statutes in Colorado and California clearly violate the negative aspect of the inherent powers doctrine. The statutes do not purport to share authority over the disqualification of district attorneys,

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46. 561 P.2d 1164 (1977).

47. CAL. PENAL CODE §1424(a)(1) (Deering 2007).

48. In *People v. Eubanks*, 927 P.2d 310, 317 (Cal. 1996), the California Supreme Court concluded that the statute precluded the use of the appearance of impropriety standard as an independent ground for recusal, holding that the critical analysis in determining the existence of a conflict instead is that "the likelihood that the defendant will not receive a fair trial-must be real, not merely apparent, and must rise to the level of a likelihood of unfairness." Importantly, because the statute did not purport to exercise exclusive authority over the office of the district attorney, the California Supreme Court did not consider whether the legislature's preclusion of the appearance of impropriety as an independent ground interferes with the court's inherent power to disqualify the office of the district attorney. Instead, it merely interpreted the statute and presumably found it consistent with its inherent power and therefore not in violation of the separation of powers doctrine.

49. Wolfram, *supra* note 13, at 4.

50. *Id.* Support for the affirmative aspect of the inherent powers doctrine is found in state constitutions. The language tends to grant the judiciary general power over judicial functions, *id.* at 5, and often resembles a variation of the following: "The judicial power shall be vested in courts consisting of a supreme court and such other courts of inferior jurisdictions as the legislature may establish." *Id.* Pursuant to the affirmative aspect of the inherent powers doctrine state supreme courts regulate attorneys in all fifty states. *See* Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1171 (2003).

51. Wolfram, *supra* note 13, at 7.

52. WOLFRAM, *supra* note 8, § 2.2 at 24.

rather, they vest exclusive authority in the legislature to promulgate the grounds for disqualification.

The Supreme Courts of Colorado and California, however, have ignored the unconstitutionality of the disqualification statutes. The Supreme Court of California, in *People v. Conner*,[53] acknowledged that the legislature promulgated section 1424 in order to change the disqualification standard the Court announced in *Greer*, yet accepted and construed the statute without even commenting on the constitutionality issue. Similarly, the Colorado Supreme Court in *People* ex rel. *N.R.*,[54] quoted the legislative declaration of "exclusive authority," noted that such a declaration contradicted the century long doctrine that courts have the inherent power to disqualify a district attorney beyond the authority granted to them by statute, cited at length numerous cases in support of courts' inherent power but concluded that: "it is unnecessary in this case to decide whether the legislature's claim of exclusive authority 'to prescribe the duties of the office of the district attorney' in the context of disqualification conflicts with the judiciary's inherent authority 'to protect its dignity, independence, and integrity.'"[55] Presumably the court did not need to decide the issue because the trial court did not explicitly invoke its inherent powers to disqualify the district attorney.

In his dissent, Justice Bender strongly disagreed.[56] Finding that the trial court acted within its inherent powers, Justice Bender reasoned that "by its use of the adverb 'only,'" the statute "narrows the traditional and time-honored inherent power of the courts and thus violates the constitutional doctrine of separation of powers."[57] Justice Bender rejected the majority's assertion that addressing the declaration of exclusivity is unnecessary, pointing out that by ignoring it the majority "effectively concludes that the disqualification statute does in fact present an exhaustive list of circumstances under which a trial court may disqualify a district attorney."[58] He concluded that "the statute's claim to set forth such an

53. 666 P.2d 5, 8 (Cal. 1983).

54. 139 P.3d 671 (Colo. 2006).

55. *Id.* at 675 n.3.

56. The dissent generally explored courts' inherent authority to protect the integrity of the judicial process as an embodiment of the separation of powers doctrine, and then specifically established that the doctrine encompasses the trial's court inherent power to disqualify a district attorney even beyond applicable disqualification statutes. *Id.* at 680-83 ("The court *is*, therefore it has the powers reasonably necessary to act as an efficient court . . . . We have defined the inherent powers of the judiciary to be the powers of that logically flow from the existence of the judiciary as a the third co-equal branch of government.") (emphasis in original) (citation omitted). It concluded that "trial courts must remain within their constitutional authority when they disqualify a district attorney for reasons other than those specified in section 20-1-107." *Id.* at 682. Finally, it asserted that the statute's language is narrower than the court's inherent powers and thus unconstitutional. *Id.* at 679.

57. *Id.* at 679 (Bender, J., dissenting).

58. *Id.*

exhaustive list infringes upon the inherent power of the court to protect the integrity of the judicial process . . . ."[59]

The dissent reflects the insight that district attorneys occupy the dual roles of officers of the court and executive officers of the state, and therefore the issue of disqualification entails a power struggle between the state and the courts. It notes that a district attorney:

> has the dual roles of executive officer of the state, and, like every other attorney, officer of the court. Hence, although a district attorney is an elected constitutional officer whose duties are prescribed by the General Assembly, she is also bound by the Rules of Professional Conduct and the rules of the court.[60]

Exactly because the question of disqualification of district attorneys entails an important battle for authority between the state and the courts, it is imperative to explore the attempt by the legislature to abrogate judicial power.[61]

Justice Bender further clarified his position in *People* ex rel. *E.L.T.*[62] He importantly explained that while he agreed with the majority that the trial court's original findings were ambiguous and that E.L.T.'s right to a fair trial was not necessarily jeopardized, disqualification was nonetheless justified because the trial court had the inherent power to disqualify the district attorney for reasons other than the ones enumerated in the statute, and specifically, for reasons beyond "special circumstances that would render it unlikely that the defendant would receive a fair trial,"[63] which were unclear in this case.[64] Irrespective of the issue of "fair trial," Justice Bender found that

> these circumstances support the trial court's decision to disqualify the district attorney's office pursuant to its constitutional authority to protect the integrity and appearance of integrity of the court and the judicial process, and therefore its order to disqualify the district attorney's office does not constitute an abuse of discretion [irrespective of whether the E.L.T.'s right to a fair trial was compromised].[65]

To the extent the California and Colorado statutes purport to curtail the courts' inherent powers to disqualify district attorneys and limit dis-

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59. *Id.* at 680.

60. *Id.* at 683 (citation omitted).

61. *Id.* at 682 ("this case presents exactly the circumstances supporting disqualification pursuant to the court's inherent powers because it presents facts which lie outside the narrow limits to the trial court's authority as defined by the disqualification statute.").

62. People *ex rel.* E.L.T., 139 P.3d 685 (Colo. 2006). Justice Bender reiterated his position that the trial court has the inherent power to disqualify a district attorney outside of the grounds specified in the statute. *Id.* at 688.

63. COLO. REV. STAT. ANN. § 20-1-107(2) (West 2007); *see infra* Part II.

64. *E.L.T.*, 139 P.3d at 688 (Bender, J., dissenting).

65. *Id.*

qualification to statutory grounds, the statutes are unconstitutional.[66] One must wonder therefore why both state supreme courts failed to invalidate the unmistakable exclusive language in the statutes.

C. The Case Against Exercising Inherent Powers to Disqualify District Attorneys

An interplay of constitutional and political considerations explains why the Supreme Courts of California and Colorado have not rushed to invalidate their states' district attorney disqualification statutes. From a constitutional perspective, when courts exercise their inherent power to disqualify district attorneys, they simultaneously assert and assault the separation of powers doctrine. Generally, by invalidating a statute, courts declare that the legislature has exceeded the power granted to it by the constitution. By invalidating a disqualification statute, however, courts declare that the legislature has usurped judicial power found not explicitly in the constitution but rather in courts' interpretation of it and of constitutional law theory.[67] In other words, in order to invalidate a disqualification statute courts must invoke the separation of powers doctrine. And yet, invalidating a disqualification statute is an act of judicial interference with important state interests entrusted in the legislature,[68] which the separation of powers doctrine would discourage.

Courts thus are in a bind: invalidating a disqualification statute requires invoking the separation of powers doctrine, the very doctrine which discourages the judiciary from intervening in legitimate interests vested in the legislative and executive branches such as the regulation of the Office of the District Attorney. The regulation of lawyers, let alone the regulation of district attorneys, "strongly involves the traditional legislative concerns with the peace, safety, and welfare of citizens and can involve matters of constitutionally legitimate concerns to the executive

66. Indeed, in its amicus brief, the Colorado Attorney General appears to concede the point. While paying lip service to the majority opinion, see Brief for Colorado District Attorney's Council as Amicus Curiae Supporting Appellant at 18, 21, People v. Lincoln, 161 P.3d 1274 (Colo. 2007) (Nos. 07SA82 and 07SA83) ("This Court has not defiantly resolved whether courts retain inherent authority to disqualify district attorneys in situations that do not meet the requirements of revised section 20-1-107 . . . . The state believes the majority's position is the wiser one."), the Attorney General characterizes the difference between the majority and the dissent not in terms of whether courts generally retain the inherent power to disqualify district attorneys independent of the disqualification statute, but rather narrowly in terms of "whether courts may disqualify district attorneys in order to preserve the 'appearance of fairness' even where there is no potential for an unfair trial." *Id.* at 20. In other words, the Attorney General implicitly acknowledges that courts *have* the inherent power to disqualify district attorneys. To him, the only difference between the majority and the dissent is whether the courts should exercise their inherent power to disqualify a district attorney in order to preserve the "appearance of fairness," not, importantly, whether they have the power to do so generally.

67. More specifically, a disqualification statute violates courts' inherent powers, which is justified in terms of the separation of powers doctrine.

68. "In American democratic theory, popularly elected legislatures are the primary source of lawmaking." WOLFRAM, *supra* note 8, § 2.2.3 at 31; *see also* Brief for Colorado District Attorney's Office Council, *supra* note 66, at 8-10.

branch as well."[69] Thus, invalidating a disqualification statute on the ground that it interferes with the ability of the judiciary to regulate district attorneys is somewhat compromised because the act of declaring the statute unconstitutional interferes with the ability of the state to regulate district attorneys.

From a political perspective, consistent with the "happy indeterminacy" approach I speculate that the California and Colorado Supreme Courts took the encroachment of their powers to be only of academic and theoretical nature and therefore not worthy of a fight. The courts seemed to have determined that the actual injury to their authority, as well as the injury to the defendants was so minimal as to not justify an explicit confrontation with the legislative branch. As we shall see, however, such a conclusion underestimates the impact of disqualification statutes on defendants, fails to appreciate the consequences for witnesses who were once a prosecutor's clients, and consequently their impact on the integrity of the judicial process.

D. The Case for Exercising Inherent Power to Disqualify a District Attorney Who Formerly Represented a Government Witness

If courts have declined to invalidate the unconstitutional component of disqualification statutes because of a political motivation, the logic would be disturbingly faulty. The stakes are much higher than an academic dispute over the separation of powers. Both the California and Colorado statutes ground disqualification in unfairness to the defendant.[70] Importantly, because the statutes do not consider the interests of other parties as relevant in assessing the fairness of the trial,[71] disqualification based on the inherent power of the courts becomes the only viable means of protecting the interests of third parties implicated in the trial, such as witnesses.

In particular, the interests of former clients who become witnesses for the government do not even enter the balance of considerations a court could consider under the disqualification statutes. Consequently, a district attorney may subpoena a former client to testify, compel him to testify by offering immunity and then pursuant to a court order disclose the former client's confidential information to the defendant if it constitutes exculpatory evidence without the former client's consent.[72] Because the former-client-turned-witness is not the defendant, he will not

69. WOLFRAM, *supra* note 8, at 30. The doctrine helps to demonstrate the unique and pervasive power of lawyers, and *only lawyers* (emphasis added), to regulate themselves. *Id.* at 29-31; Wolfram, *supra* note 13, at 16-19.

70. *See infra* Part II.

71. *Infra.*

72. *See, e.g.*, People v. Lincoln, 161 P.3d 1274 (Colo. 2007); *Infra* Part III; notes 190-193 and accompanying text.

be able to protect his confidentiality interest by moving to disqualify the district attorney, his former lawyer.

The harm suffered by a former-client-turned-witness from disclosure of his confidential information may be significant. In addition, compromising the confidentiality interests of witnesses harms an important public interest: confidentiality is the cornerstone of the attorney-client relationship.[73] It establishes trust, enables an open and complete exchange between attorney and client essential to effective representation,[74] and generally fosters public confidence in the legal profession.[75] Statutes that do not even allow courts the discretion to assess the harm to the confidentiality interests of third parties as grounds for disqualification are thus ill-advised.

Confidentiality, to be sure, is not an absolute doctrine. The state's interest in prosecuting a criminal defendant in a particular instance may require the disclosure of confidential information of a district attorney's former-client-turned-witness.[76] For example, in a case in which a former-client of the district attorney is a key witness for the government, confidential information shared by the former-client with the district attorney constitutes exculpatory evidence, a special prosecutor cannot be appointed and the harm suffered by the former-client-turned-witness from the disclosure of his confidential information to the defendant is negligible, the court may order the district attorney to reveal the confidential information to the defendant.

Such a decision to compel disclosure of confidential information, however—especially when the confidentiality interests at stake are those of a third party witness whose only connection to the prosecution is the fact that he happens to be a former client of the prosecuting district attorney—cannot be a foregone conclusion. To the contrary, because of confidentiality's fundamental importance to the client-lawyer relationship, the Rules of Professional Conduct presume to protect confidential information, not disclose it.[77] Consequently, while in some circumstances a district attorney may be ordered by a court, as an exception, to reveal confidential information of a former-client-turned-witness, given the

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73. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 1 (2007).

74. *Id.* at cmts. 2-3 (2007).

75. *See generally* Eli Wald, *Lawyer Mobility and Legal Ethics: Resolving the Tension Between Confidentiality Requirements and Contemporary Lawyers' Career Paths*, 31 J. LEGAL PROF. 199, 203-07 (2007).

76. Rule 1.6(b)(6) of the American Bar Association Model Rules of Professional Conduct will allow a district attorney to reveal confidential information of a former-client-turned-witness assuming the information constitutes exculpatory evidence and the court grants an order compelling disclosure. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(6) (2007)

77. *See.* MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (establishing a presumptive duty of non-disclosure regarding all information relating to the representation), as opposed to Rule 1.6(b)(6) (carving an exception to confidentiality based on a court order). MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(6).

harm to the witness and the interest of society in protecting confidentiality, the court must have the countervailing authority to exercise its inherent power and disqualify a district attorney in instances where the harm to the state is relatively small and the harm to the former-client-turned-witness is great. For example, disqualification based on inherent powers may be appropriate where the state can easily appoint another district attorney to prosecute the defendant who has not represented any of the key witnesses in the case against defendant.

Moreover, given the public interest in preserving confidentiality, the court may exercise its inherent power and disqualify the district attorney even if the former client waives his confidentiality interest. Such disqualification may be warranted in circumstances where the court believes that the former-client-turned-witness was facing a dilemma of having to choose between protecting his confidentiality interest and winning favor with the district attorney, or where the court finds that that the former-client may be colluding with the district attorney. Such collusion, for example, may be the result of the former relationship between the witness and the district attorney.

When a district attorney once represented a government witness, a court should be able to assess the totality of the circumstances and use its inherent power to disqualify the district attorney if disqualification is necessary the protect the interests of a former-client-turned-witness and the integrity of the trial. Otherwise, the important interest of the former client in protecting his confidentiality may be compromised, and with it, the integrity of the fact-finding process. To be sure, consistent with the "happy indeterminacy" approach and the framework set by *Link* and *Chambers* courts should use their inherent power to disqualify district attorneys sparingly. And yet disqualification statutes that usurp the inherent power of the courts and deprive courts of the authority to protect the interests of third parties, such as former-clients-turned-witnesses, are not only unconstitutional but also undesirable.

II. STATUTORY DISQUALIFICATION OF DISTRICT ATTORNEYS

A. Statutory Disqualification

Providing an overview of disqualification statutes is difficult because the majority of states do not have disqualification statutes,[78] some state statutes do not directly state the grounds for disqualification but rather grant the court the power to appoint a special prosecutor when, among other reasons, the district attorney is disqualified,[79] and among

78. Suggesting perhaps that some state legislatures defer to courts regarding whether to disqualify a district attorney.

79. For example, Nevada's statute states that: "[i]f the district attorney . . . for any reason is disqualified . . . the court may appoint some other person to perform the duties of the district attorney." NEV. REV. STAT. ANN. § 252.100.1 (West 2007); *see also* ALA. CODE § 12-17-186(a) (2007);

the states with statutes clearly stating bases for disqualification the grounds vary considerably. This section analyzes Colorado's legislation, and uses it as a basis for comparative analysis of some other states' responses to this issue.

C.R.S. subsection 20-1-107(2) reads in relevant part:

> A district attorney may only be disqualified in a particular case at the request of the district attorney or upon a showing that the district attorney has a personal or financial interest or finds [sic] *special circumstances that would render it unlikely that the defendant would receive a fair trial* . . . .[80]

Whether "special circumstances" include representation by a district attorney of former-clients-turned-witnesses for the government is a question of first impression for the Colorado Supreme Court.[81] The first two prongs of the statute, request by the district attorney and showing of a conflict of interest are irrelevant here. To date, the "special circumstances" prong of subsection 20-1-107(2) has mostly been invoked when a district attorney previously represented the defendant. Subsection 1 thus explores "special circumstances" when the district attorney represented the defendant, subsection 2 examines other instances in which "special circumstances" have been construed and subsection 3 studies disqualification statutes in other jurisdictions.

1. "Special Circumstances" When the District Attorney Represented the Defendant: The *Unfair Advantage* Standard

In *People v. Chavez*,[82] the Colorado Supreme Court construed, for the first time, the "special circumstances" prong of the statute when the district attorney previously represented the defendant.[83] The court held

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IOWA CODE ANN. § 331.754(2) (West 2007); MINN. STAT. ANN. § 388.12 (West 2007); N.Y. COUNTY LAW § 701(1) (McKinney 2007); OKLA. STAT. ANN. tit. 22, § 859 (West 2007) ("If the district attorney . . . is disqualified, the court must appoint some attorney-at-law to perform the duties of the district attorney on such trial.").

80. COLO. REV. STAT. ANN. § 20-1-107(2) (West 2007) (emphasis added). The statute's ambiguous language means either that a district attorney may be disqualified upon a showing that the district attorney has a personal interest or a showing that the *district attorney* finds special circumstances; or that a district attorney may be disqualified upon a showing that the district attorney has a personal interest or a finding by a *court* that there are special circumstances. As Justice Bender explains in People *ex rel.* N.R., 139 P.3d 649, 675 (Colo. 2006), the latter reading, vesting authority in the courts to find "special circumstances," is both more reasonable and compelling.

81. One amicus brief filed in *Lincoln* suggests that no case decided the issue before because "disqualification in this situation is such a leap of logic that no judge had previously granted such a motion." Brief for Colorado District Attorney's Office Council, *supra* note 66, at 5. Of course, in the alternative, this may simply be an issue of first impression.

82. 139 P.3d 649.

83. *Id.* at 653. The court noted that while it never construed subsection 20-1-107(2) before, it did explore the kinds of facts that warrant disqualification to ensure that defendant receives a fair trial in *Farina* and *Osborn*. *See infra* note 97 and accompanying text. The court explained that while the cases were decided under the appearance of impropriety standard replaced by the statute, their precedential value stems from the analysis of facts upon which the court may conclude that the accused will probably not receive a fair trial. *Chavez*, 139 P.3d at 653 n.5.

that "where the prosecuting attorney had an attorney-client relationship with the defendant in a case that was substantially related to the case in which the defendant is being prosecuted, 'circumstances exist that would render it unlikely that the defendant would receive a fair trial.'"[84] The court noted that the advantage that such an attorney-client relationship could give the district attorney on cross-examination of the defendant 'is obvious,'[85] and reasoned that both passage of time between the attorney-client relationship and the prosecution,[86] and factual distinctions between the two cases would be relevant in assessing "special circumstances."[87]

It is noteworthy that the court did not find that that any representation of the defendant warrants disqualification of the district attorney, but rather only representation that is the same or "substantially related to the case in which the defendant is being prosecuted" supports disqualification, subject to the passage of time consideration.[88] No doubt, any prior representation of the defendant by the district attorney will give the government an "obvious" advantage on cross-examination of the defendant. Yet the court reasoned that the advantage only results in unfairness to the defendant when the prior representation is the same or "substantially related" to the current prosecution, presumably because when the representation is "substantially related" the advantage to the government results not only from the district attorney's general familiarity with the defendant but also from knowledge of relevant confidential information related to the current prosecution.[89]

In *People v. Manzanares*,[90] the Colorado Supreme Court expanded its analysis of "special circumstances" in two ways.[91] First, with regard to the identity of individuals who could trigger disqualification, it held that "special circumstances" may exist not only when a district attorney previously represented the defendant, but also when other employees in the District Attorney's Office gained confidential information about the defendant's case.[92] Because the key issue is advantage to the government at the expense of the defendant, the court disqualified the District

84. *Chavez*, 139 P.3d at 653 (quoting COLO. REV. STAT. § 20-1-107(2) (2005)).

85. *Id.* (quoting Osborn v. Dist. Court, 14th Judicial Dist., 619 P.2d 41, 45 (Colo. 1980)).

86. *Id.* (citing *Osborn*, 619 P.2d at 48) (noting that the *Osborn* court found that the passage of thirteen years between representation of the defendant and prosecution supported the conclusion that the defendant had not met his burden of proving he would not receive a fair trial).

87. *Id.* at 653-54 (finding that the district attorney in question had an attorney-client relationship with the defendant and that the relationship was substantially related to the instant prosecution, the court disqualified the district attorney).

88. *Id.* at 653.

89. *Id.* at 654.

90. 139 P.3d 655 (Colo. 2006).

91. *Id.* at 658-59 (remanding because the court found that "[w]e are unable to determine, on the record before us, whether 'special circumstances' exist . . . [because] the record does not disclose whether [the district attorney's] prior representation of the defendant was 'substantially related' to the instant prosecution." (quoting *Chavez*, 139 P.3d at 653)).

92. *Id.* at 659. In *Manzanares*, a clerical employee who worked for the defense attorney who represented the defendant later joined the district attorney's office. *Id.*

Attorney's Office even when the tainted individual was not a former defense attorney-turned-district attorney but a clerical employee: the employee learned confidential information about the defendant while working in private practice that would have given the district attorney an advantage in cross-examining the defendant. Second, the court explained that an important factor in assessing "special circumstances" when a district attorney has represented the defendant is the "possibility that confidential information could be used to the advantage of the government."[93]

The court therefore found "special circumstances" rendering it "unlikely that the defendant would receive a fair trial" when the representation of the defendant by the district attorney could give the government an unfair advantage.[94] The court reasoned that the government benefits to the extent that the trial is rendered "unlikely fair" when the district attorney can take advantage of the former relationship to more effectively cross-examine the defendant, and explained that such an obvious unfair advantage takes place when the former representation and the current prosecution are "substantially related" because of the high probability that the district attorney would have knowledge of relevant confidential information.[95]

Earlier decisions by the court preceding the statute further clarify the appropriate scope of "special circumstance" and "fair trial."[96] In *People* ex rel. *Farina* the trial court disqualified the district attorney who thirteen years prior, while in private practice, represented the defendant in an unrelated matter.[97] The court reversed. It found that "where the two incidents arose from entirely unrelated transactions and are separated by nearly thirteen years, no reasonable appearance of impropriety exists."[98] Specifically, the court found that the factual settings of the two cases were significantly different.[99] In other words, the passage of time

93. *Id.* In a third case construing the statute, People *ex rel.* E.L.T., 139 P.3d 685, 686 (Colo. 2006), the defendants argued that the district attorneys represented them when they were in private practice and gained confidential attorney-client information about defendants as a result of this representation. The court remanded because it was unable to determine the legal basis for the trial court's disqualification of the district attorney and directed the lower court to its decision in *Chavez*. *Id.* at 687 (citing *Chavez*, 139 P.3d at 655).

94. *Manzanares*, 139 P.3d at 659.

95. *See id.*

96. As the court pointed out in *Chavez*, 139 P.3d at 653, earlier case law construing the amended disqualification statute is nonetheless relevant to the extent it considered what type of facts support the conclusion that disqualification is necessary to ensure that the defendant receives a fair trial. *See also* People *ex rel.* N.R., 139 P.3d 649, 677 (Colo. 2006).

97. Osborn v. Dist. Court, 14th Judicial Dist., 619 P.2d 41, 47 (Colo. 1980). *Osborne* consolidated two cases, *Osborne* and *Farina* which the court considered separately because of their different facts. *Id.* at 44. *Osborne* is discussed below, *infra* note 148-52 and accompanying text.

98. *Id.* at 47.

99. *Id.* ("[T]he [older] matter arose from a disturbance in a bar owned by [defendant's] mother while the pending prosecution is in connection with an alleged burglary. Although both incidents involved acts of violence, it can hardly be said that they are 'substantially related.' This is particularly so in light of the fact that they are separated by nearly thirteen years.").

and the unrelated nature of the former representation and current prosecution made it less likely that the government would benefit from the former representation and therefore there was no unfairness to the defendant.

2. "Special Circumstances" When the District Attorney Did Not Represent the Defendant: The *Balancing of Interests* Standard

In *People* ex rel. *N.R.*,[100] the Colorado Supreme Court was called upon for the first time to construe "special circumstances" under the statute in a case not involving a district attorney's former representation of the defendant. The court explored the defendant's contention that the district attorney's attempt to reap political gain from the prosecution constituted "special circumstances" which would render it unlikely he will receive a fair trial. The court found that "even if [the district attorney] owes his election to the Office of District Attorney in part to the efforts of the [victim's] family, this fact [is not] likely to cause him to 'over extend' in performing his prosecutorial function."[101]

The court's conclusion hinged on the facts of the case. The court explained that the defendant must establish facts from which the court could reasonably conclude that he would not receive a fair trial and found that a mere assertion of political indebtedness is not sufficient to establish special circumstances.[102] Rather, the defendant has to demonstrate "over extension" in order to meet the "special circumstances" burden.[103] In other words, the court did not rule out political indebtedness as a relevant consideration in assessing "special circumstances" but instead found that in this particular case the defendant did not prove that such political indebtedness in fact caused the district attorney to over extend himself.[104] Importantly, the dissent pointed out, however, that the trial court specifically found that "the public would view the prosecution as a 'political payoff,' and if the district attorney continued to prosecute it would 'undermine the credibility of the criminal process.'"[105]

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100. 139 P.3d at 671. A newly elected district attorney filed charges against a minor who was involved in a car accident and left the scene after his predecessor decided not to file charges. *Id.* at 673. Defendant argued that the district attorney's decision was motivated by political pressure by the victim's parents. *Id.* at 676. The court first explored what sort of "interest" may serve as the basis for disqualification. *Id.* at 676-77. It held that the district attorney must stand to receive some personal benefit and found that possible political capital the district attorney might gain in future elections as the result of prosecuting the defendant is insufficient to meet the standard. *Id.*

101. *Id.* at 678.

102. *Id.* at 677-78.

103. *Id.* at 678.

104. *See id.*

105. *Id.* at 680 n.4 (Bender, J., dissenting). The dissent did not explore political indebtedness as an instance of "special circumstances" but instead argued that "political payoff" that would "undermine the credibility of the criminal process" triggers the courts' inherent powers. *Id.* at 684-85. Justice Bender explicitly refused to limit the scope of its dissent to the construction of the "special circumstances" grounds of disqualification pursuant to the statute exactly because he believes that

Prior decisions of the court preceding the enactment of the statute once again shed additional light on the construction of "special circumstances" and an "unfair" trial. In *People v. C.V.*[106] the defendant moved to disqualify the district attorney because the district attorney regularly attended a church that was the scene of the alleged crime.[107] Exploring whether the defendant will be denied a fair trial, the court stated that it looks to "whether the facts support a conclusion that the 'public would perceive continued prosecution by the district attorney's office, under the particular circumstances here, as improper and unjust, so as to undermine the credibility of the criminal process in our courts.'"[108] Subsequently, assessing the "particular circumstances here" the court balanced the interests of the defendant against performance of the duties of the District Attorney's Office.[109] It considered as relevant factors the size of the community in question and the impact of disqualification on it.[110] The court also cautioned against too low a standard that would allow defendants the "unfettered option of disqualifying a prosecutor whenever a district attorney had knowledge of any fact surrounding the case,"[111] and against "the most cynical view" approach that would find "far too attenuated" facts supportive of disqualification.[112]

In *People v. District Court* ex rel. *Second Judicial District*,[113] the defendant argued that the district attorney who was also a mayoral candidate would reap political gain from prosecuting the defendant and would be placed in a position of over extending in an effort to convict and thus would unfairly try the defendant.[114] In evidence, defendant submitted a copy of a news article which was later reprinted as a paid advertisement by a committee to elect the district attorney.[115] The court found this evidence insufficient to justify disqualification.[116] While the court's language could be construed to refer only to the evidentiary showing the defendant must make, it could also suggest the court's con-

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courts have the inherent powers to disqualify district attorneys in addition to and irrespective of a disqualification statute. *Id.* at 680 n.4.

106. 64 P.3d 272 (Colo. 2003) (en banc).

107. *Id.* at 274 (reversing disqualification on the ground that the trial court had insufficient evidence to reach such a conclusion).

108. *Id.* at 276 (citations omitted).

109. The court found that disqualifying a district attorney who happened to attend a facility where a crime later took place would "greatly impair the independence of the district attorney and could serve to prejudice the constitutional duties he or she performs." *Id.*

110. "Especially in smaller communities, the defendant's argument could potentially disqualify the district attorney in practically every prosecution." *Id.*

111. *Id.* at 276-77.

112. *Id.* at 275, 277.

113. 538 P.2d 887 (Colo. 1975) (en banc).

114. *Id.* at 888.

115. *Id.* at 889.

116. *Id.* ("The language of the editorial indicates only a newspaper's belief that the district attorney is properly performing his responsibilities and duties as district attorney in the [] case. There are no other inferences which could be drawn from this language. Clearly, it would be beyond belief that anyone could state on the basis of this editorial that defendant [] would be subjected to an unfair trial because of this district attorney's past, current, or future participation in the case.").

cern with too quick a finding of "unfair trial" and "special circumstances" warranting disqualification.

Finally, in *Wheeler v. District Court* ex rel. *Adams County*,[117] defendant argued that disqualification was warranted because he testified against the district attorney in an unrelated case.[118] Assessing whether the district attorney's "personal antagonism, animosity, hostility or enmity" toward defendant would deny defendant a fair trial, the court was concerned with the performance of the duties of the District Attorney's Office.[119] It reasoned that the mere fact that a defendant has testified against or made derogatory remarks about a district attorney was insufficient to "convince a sane and reasonable mind" that the attacked district attorney would be biased or prejudiced.[120]

Twin standards emerge from the case law determining whether "special circumstances" exist. When the district attorney formerly represented the defendant, the "unfair advantage" standard applies and "special circumstances" exist when the former representation and the current prosecution are "substantially related" because the district attorney likely learned relevant confidential information and would be able to use it to the benefit of the government while cross-examining the defendant. Such an unfair advantage would undermine the credibility of the criminal process in our courts.

When the district attorney did not represent the defendant, the passage of confidential information from the defendant to the district attorney is obviously not a concern and the "balancing of interests" standard applies. The likely fairness of the trial is assessed by balancing the interests of the defendant against the performance of the duties of the District Attorney's Office. "Special circumstances" exist when the district attorney is likely to "over extend," when the district attorney has "personal antagonism, animosity, hostility or enmity" against the defendant, or when the defendant can establish facts, such as political indebtedness, that would render the trial unfair.[121]

3. Comparative Analysis

Before turning to the application of these standards to the first impression issue of a district attorney who represented former-clients-turned-witnesses for the government, we turn our attention to disqualification statutes and experience of other jurisdictions. For purposes of

117. 504 P.2d 1094 (Colo. 1973) (en banc).
118. *Id.* at 1095.
119. *Id.*
120. *Id.* at 1096.
121. In balancing the interests of the defendant against the performance of the duties of the district attorney's office relevant considerations include the size of the legal community and the impact of disqualification on the ability of the District Attorney's Office to perform its duties. *See* People v. C.V., 64 P.3d 272, 276 (Colo. 2003) (en banc).

comparative analysis, it is helpful to draw a distinction between the three grounds for disqualification in the Colorado statute. The first two—a request by the district attorney and a personal or financial conflict of interest—are narrowly and specifically defined, whereas the third ground—"special circumstances"—is, relative to the former two grounds, open-ended.[122] As we have seen, the latter covers at least disqualification of a district attorney who represented the defendant in the same or substantially related case and opens the door for disqualification even when the district attorney did not represent the defendant.

Most jurisdictions with a disqualification statute state only narrow and specific grounds for disqualification, akin to Colorado's first two grounds. Interestingly, some cover in a narrowly stated ground the situation Colorado covers in its open-ended "special circumstances" ground, that is, representation of the defendant by the district attorney.[123] Several jurisdictions do have open-ended standards of disqualification, however, their respective case law interpreting the standards is scant.[124]

California's statute is in substance similar to Colorado's. It states in relevant part that: "[a disqualification] motion may not be granted unless the evidence shows that a conflict of interest exists that would *render it*

122. Yet not open-ended enough to include the appearance of impropriety as a ground for disqualification. *See supra* notes 39-45.

123. For example, the Alabama statute allows for disqualification when the district attorney is "connected with the party against whom it is his duty to appear," ALA. CODE § 12-17-186(a) (2007); the Kentucky statute states, in relevant part, that a prosecuting attorney shall disqualify himself if he "[h]as served in private practice or government service, other than as a prosecuting attorney, as a lawyer or rendered a legal opinion in the matter in controversy." KY. REV. STAT. ANN. § 15.733(2)(e) (2007); *see also* IDAHO CODE ANN. § 31-2603(a) (2007) (allows for disqualification when the district attorney "acted as counsel or attorney for a party accused in relation to the matter of which the accused stands charged, and for which he is to be tried on a criminal charge."); LA. CODE CRIM. PROC. ANN. art. 680(3) (2007) ("A district attorney shall be recused when he . . . [h]as been employed or consulted in the case as attorney for the defendant before his election or appointment as district attorney.").

124. Iowa's statute permits the appointment of a special prosecutor if the district attorney is "disqualified because of a conflict of interest from performing duties." IOWA CODE § 331.754.2 (2006); *see* State v. Brandt, 253 N.W.2d 253, 262 (Iowa 1977) (the prosecutor disqualified herself and requested the appointment of a special prosecutor). Indiana's statute allows the court to disqualify a district attorney if it finds "by clear and convincing evidence that the appointment [of a special prosecutor] is necessary to avoid an actual conflict of interest." IND. CODE § 33-39-1-6(b)(2)(B) (2007). Georgia's statute similarly states: "When a solicitor-general's office is disqualified from interest or relationship to engage in the prosecution." GA. CODE ANN. § 15-18-65(a) (2007); *see also* 55 ILL. COMP. STAT. ANN. 5/3-9008 (2007) ("Whenever the State's attorney is . . . interested in any cause or proceeding . . . ."); MICH COMP. LAWS SERV. § 49.160(1) (2007) ("If the prosecuting attorney . . . [is] disqualified by reason of conflict of interest . . . ."); MO. ANN. STAT. § 56.110 (2007). Oregon's statute combines specific grounds for disqualification such as "if a district attorney . . . represented the accused in the matter to be investigated . . . or the crime charged" with an open-ended ground "or because of any other conflict cannot ethically serve as a district attorney in a particular case." OR. REV. STAT. ANN. § 8.710 (2007); *see* State v. Gauthier, 231 P. 141 (Or. 1924). Virginia's statute is open-ended, allowing for disqualification if the district attorney "is so situated with respect to such accused as to render it improper . . . for him to act." VA. CODE ANN. § 19.2-155 (2007); *see also* W. VA. CODE ANN. § 7-7-8 (2007) (applying the "improper" standard for disqualification). The Virginia Supreme Court applies the rule of *ejusdem generis* to the general statutory language of "reason of a temporary nature" and holds that the term must be restricted to meanings "analogous to 'sickness' or 'disability.'" *In re* Morrisey, 433 S.E.2d 918, 918 (Va. 1993).

unlikely that the defendant would receive a fair trial."[125] The standard for the interpretation of the statute was set in *People v. Conner*,[126] in which the California Supreme Court defined a conflict for purposes of construing the statute as existing "whenever the circumstances of a case evidence a reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner."[127] The conflict is disabling under section 1424 when it is "'so grave as to render it unlikely that the defendant will receive fair treatment' during all portions of the criminal proceedings."[128]

In *People v. Eubanks*,[129] the California Supreme Court specified a two-part test for determining whether recusal of a district attorney is necessary based on a conflict of interest: (1) whether there is a conflict of interest, and (2) if so, whether the conflict is so grave or severe as to disqualify the district attorney from acting.[130] Under the second prong of this test, the potential for prejudice to the defendant must be real, not merely apparent, and must rise to the level of a likelihood of unfairness.[131]

With regard to the "unfair advantage" standard, consistent with Colorado law, the California Supreme Court disqualified a district attorney who represented a defendant in a "substantially related" case.[132] Regarding the "balancing of interests" standard, California case law is instructive because California courts have interpreted the California statute, and specifically its "fair trial" element, in circumstances where the district attorney did not represent the defendant.[133]

The first category of cases involves circumstances where the California Supreme Court was concerned with the independence of the district attorney's exercise of discretion. If a victim or another party funds or helps fund the prosecution's case, a conflict of interest is worthy of disqualification if the facts show that "the private financial contributions are of a nature and magnitude likely to put the prosecutor's discretionary decision-making within the influence or control of an interested party."[134]

125. CAL. PENAL CODE § 1424(a)(1) (2007) (emphasis added).

126. 666 P.2d 5 (Cal. 1983).

127. *Id.* at 9.

128. People v. Snow, 65 P.3d 749, 773-74 (Cal. 2003).

129. 927 P.2d 310 (Cal. 1996).

130. *Id.* at 318; *see Snow*, 65 P.3d at 773-74; *Conner*, 666 P.2d at 8-9; People v. Choi, 94 Cal. Rptr. 2d 922, 926 (Cal. Ct. App. 2000).

131. Hambarian v. Superior Court, 44 P.3d 102, 114 (Cal. 2002).

132. City of San Francisco v. Cobra Solutions, 135 P.3d 20 (Cal. 2006) (holding District attorney's possession of a criminal defendant's confidential attorney-client information regarding the charged offenses is a proper basis for disqualifying the district attorney from participating in the prosecution to ensure a fair trial).

133. *See* People v. Jiang, 33 Cal. Rptr. 3d 184, 208 (Cal. Ct. App. 2005).

134. *See Eubanks*, 927 P.2d at 322. If the prosecutor/district attorney's office requests payment from victim for costs that the office already incurred during the prosecution, disqualification may be possible. *Id.* at 323. In other words, if the prosecutor solicited financial assistance, the prosecutor's discretionary judgment may be skewed. *Id.* at 324 (George, C.J., concurring).

The size of the contribution is compared to the normal level of funds generally allotted to this or a similar prosecution.[135] In other words, the court must determine whether the contribution was substantial compared to the District Attorney's Office's normal budgetary allotment or resources.[136] The strength of the case against the defendant matters in assessing the importance of the financial factor.[137] In addition, the court must determine whether the financial provider had an interest in prosecuting the specific defendant, or an interest in benefiting the general public corresponding with the interest of the prosecution.[138] That is, two related factors are whether the financial provider is a private party[139] and whether the defendant's actions directly harmed the financial provider.[140] Moreover, even an institutional agreement between government agencies *may* create a conflict of interest that triggers disqualification because the arrangement would negatively affect the prosecutor's discretionary judgment.[141] Similarly, the court held that close family relationship between the defendant and longtime employees of a District Attorney's Office may qualify as grounds for disqualification because such ties are likely to influence the district attorney's discretion.[142]

A related category deals with publicly disclosing information relevant to the case and information that may taint the public's perceptions of defendant. For example, in *People v. Choi*,[143] the court was concerned that the district attorney's loss of a close friend had adversely affected his independent judgment in such a way that defendant's right to a fair trial

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135. *Id.* at 323.

136. *Id.* at 324 (George, C.J., concurring).

137. "Arguably, a factually weak case is more subject than a strong case to influence by extraneous financial considerations, since in the absence of financial assistance from the victim the prosecutor is more likely to abandon or plea bargain such a case." *Id.* at 323.

138. *Compare Eubanks*, 927 P.2d 310, where the interested party that provided financial assistance was a corporation from which defendant allegedly stole trade secrets, *with People v. Parmar*, where a government agency contracted with the district attorney's office to provide financial assistance in order to prosecute public nuisances generally. 104 Cal. Rptr. 2d 31 (Cal. Ct. App. 2001).

139. Hambarian v. Superior Court, 44 P.3d 102, 109 (Cal. 2002); *Parmar*, 104 Cal. Rptr. 2d at 42; *Eubanks*, 927 P.2d at 320.

140. *Parmar*, 104 Cal. Rptr. 2d at 42.

141. Marshall v. Jerrico, Inc., 446 U.S. 238, 250 (1980); *Parmar*, 104 Cal. Rptr. 2d at 42; *Eubanks*, 927 P.2d at 320 (emphasis added) ("For example, a scheme that provides monetary rewards to a prosecutorial office might carry the potential impermissibly to skew a prosecutor's exercise of the charging and plea bargaining functions.").

142. People v. Vasquez, 137 P.3d 199, 203 (Cal. 2006) (finding close family ties where defendant's mother worked as an administrator in the district attorney's office for about 13 years, and her husband, defendant's stepfather had been employed for around the same amount of time as a deputy district attorney). The fact that the prosecutor admitted fear of the appearance of favoritism towards defendant, and that fear influenced the decision to reject defendant's request for bench trial rather than jury trial showed the existence of a conflict of interest and its extreme gravity. *Id.* at 203-04. However, compare this to *People v. Petrisca*, 41 Cal. Rptr. 3d 182, 183 (Cal. Ct. App. 2006), where the defendant was charged with murder and other felonies for driving at excessive speeds on the wrong side of the road and colliding with two vehicles. The driver of one vehicle incurred fatal injuries and was also the mother of a deputy district attorney in the office. *Id.* The prosecutor was chosen for the specific reason that the deputy district attorney and the prosecutor did not have a social relationship—disqualification was not required. *Id.* at 185.

143. 94 Cal. Rptr. 2d 922 (Cal. Ct. App. 2000).

was endangered.[144] It found that the district attorney's disclosure of information related to the case demonstrated the adverse impact and disqualified the district attorney.[145] Finally, the court decided cases triggering disqualification based on the district attorney appearing as a witness. For example, when a prosecutor witnesses the defendant's illegal actions the conflict may be so grave as to require disqualification.[146]

Read together, California's extensive case law construing its disqualification statute expands Colorado's "balancing of interests" standard. It clarifies that not every conflict of interest gives rise to "special circumstances" warranting disqualification, rather, the prejudice against defendant must be severe enough to constitute unfairness.

B. Disqualification of a District Attorney Whose Former Client is a Witness for the Government: Striking a Balance at the Point of Unfair Advantage

First impression construction of the "special circumstances" prong when the district attorney represented former-clients-turned-witnesses for the government should build on and combine both the "unfair advantage" and the "balancing of interests" standards. Reliance on the "unfair advantage" standard is warranted because representation of witnesses for the government by the district attorney resembles representation of the defendant in two important ways.

First, the unfair advantage to the government stems from the district attorney's former representation of clients-turned-witnesses. "Special circumstances" simply do not require that the former representation be of the defendant. Indeed, in *Manzanares* the court recognized that people other than the district attorney and the defendant might cause disqualification.[147]

Second, the former representation gives the district attorney an "obvious" advantage over the defendant in terms of questioning the former-client-turned-witness. An instructive case is *Osborn v. District Court, Fourteenth Judicial District*.[148] *Osborne* involved a former district attorney who after participating in the prosecution of the defendant joined a law firm that handled defendant's appeal and re-trial.[149] The court upheld the disqualification of the former district attorney.[150] It found that the district attorney "took part in the interview of the victim, the arresting officers, and many other important prosecution witnesses. Most impor-

144. *Id.*
145. *Id.* at 927.
146. People v. Jenan, 44 Cal. Rptr. 3d 771, 776 (Cal. Ct. App. 2006).
147. People v. Manzanares, 139 P.3d 655, 658-59 (Colo. 2006); *supra* notes 90-92 and accompanying text.
148. 619 P.2d 41 (Colo. 1980).
149. *Id.* at 44-45.
150. *Id.* at 45.

tantly, [the district attorney] had an ongoing relationship with the victim, who was then a juvenile undergoing a number of problems which required extended supervision."[151] The court concluded, "[t]he advantage that such a relationship could give a defense lawyer on cross-examination of the victim is obvious."[152] That is, the court held that the former district attorney's substantial participation in the same case and, importantly, the nature of her relationship with the witness (the victim) warranted her disqualification.

Yet analysis of the "unfair advantage" standard indicates that not every advantage to the government renders the trial "likely unfair" from the defendant's point of view. When the district attorney represented the defendant the court determined that the former representation results in an unfair advantage if it was the same or substantially related to the current prosecution because the relationship raised a serious concern that the district attorney might take advantage of related confidential information the defendant revealed.

Representation of a former-client-turned-witness differs from representation of the defendant because a key concern in the latter case is the passing of confidential information from the defendant to the district attorney which can give the government an unfair advantage. The advantage to the government here stems not from its access to confidential defendant's information, but from the relationship of the district attorney with a witness. To be sure, if the representation of the former-client-turned-witness is in the same or "substantially related" matter, the district attorney may have learned relevant confidential information while representing the witness. Such information, however, will not yield the government an unfair advantage because the district attorney will have to reveal all such exculpatory information to the defendant.[153]

It is important to note that the primary concern with regard to the representation of witnesses is the extent of their relationship with the district attorney and therefore mere discovery of information the district attorney learned about the witness is not sufficient to ensure fairness to the defendant. First, the district attorney could have learned confidential information about the witness that the defendant will not be entitled to and that the witness may not be under a duty to reveal. Second, the dis-

151. *Id.*

152. *Id.*

153. While COLO. R. PROF'L COND. R. 1.6(a) (2007) extends confidentiality to all information related to the representation of clients, COLO. R. PROF'L COND. R. 1.9(a) (2007) prohibits an attorney from representing another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of a former client, COLO. R. PROF'L COND R. 1.9(c) prohibits an attorney from using or revealing confidential information of a former client, and COLO. R. PROF'L COND R. 1.11(d)(1) (2007) subjects a district attorney to these provisions, nonetheless, COLO. R. PROF'L COND R. 1.6(b)(6) states that an attorney may reveal confidential information if required by other law. As the court pointed out in *Lincoln*, other law requires the disclosure of exculpatory information to the defendant. People v. Lincoln, 161 P.3d 1274, 1279-80 (Colo. 2007).

trict attorney's relationship with the witness will give the district attorney an advantage in examining the witness. For example, the district attorney might use information that does not meet the exculpatory threshold but nonetheless might help in eliciting favorable testimony from the client-turned witness. Moreover, given the prior relationship the witness might be partial toward his lawyer-turned-district attorney.[154]

Osborne clarifies that the court's concern is the fairness of the trial, and that knowledge of confidential information is not the standard for disqualification but rather an example of "special circumstances," and of an unfair advantage warranting disqualification.[155] To be sure, the court disqualified the district attorney-turned-defense attorney not because she possessed confidential information about the witness. Rather, the court disqualified the attorney because her former relationship with the witness in the case gave her an unfair advantage over the state in cross-examining the witness.[156]

The issue therefore becomes how to quantify the advantage to the government in assessing when the advantage from the former representation of former-clients-turned-witnesses compromises the fairness of the trial. The "balancing of interests" standard is on point and the California Supreme Court's two-step analysis requiring a conflict and then assessing its severity is helpful. The mere representation of the former-client-turned-witness satisfies the conflict requirement and yet unfairness to the defendant is only likely when the representation meets the severity requirement.[157] Balancing the interests of the defendant against the interests of the state in the performance of the duties of the District Attorney's Office and striking the balance at the point of an unfair advantage to the government means that a district attorney should be disqualified if she formerly represented a witness in a "substantially related" matter because the representation would give the district attorney an advantage over the defendant in examining the witness. *Osborn* is directly on point. The court held that the former district attorney's substantial participation in the same case warranted her disqualification.[158]

Moreover, even if the representation of the witness is not "substantially related" to the prosecution of defendant, the district attorney should be disqualified if her relationship with the witness would give her an unfair advantage over the defendant. The fact-specific, case-by-case determination will depend on elements such as the importance of the testimony (i.e., whether the former client is a key witness), the passage of

154. The desire of a former-client-turned-witness to help his former lawyer-turned-district attorney need not amount to committing perjury. The advantage to the government stems from the efforts of the witness to cooperate with thee district attorney given their relationship.

155. *See* Osborn v. District Court, Fourteenth Judicial Dist., 619 P.2d 41 (Colo. 1980).

156. *Id.* at 47.

157. *See supra* notes 129-133 and accompanying text.

158. 619 P.2d at 45.

time, the nature of the relationship between the witness and the district attorney, whether the relationship has concluded and the size of the community.

This proposed standard—combining the insights of both "unfair advantage" and the "balancing of interests"—leads to the question of how to assess factually the nature of the relationship between the district attorney and the former-client-turned-witness. Based on *Brady v. Maryland*,[159] in which the court held that a declaration by the district attorney that all exculpatory information has been disclosed would suffice, and the defendant could only challenge it with a good faith basis, a declaration by the district attorney outlining the nature of the relationship with the former-client-turned-witness should suffice to allow the court to assess the fairness to the defendant.[160]

In conclusion, representation of a former-client-turned-witness may constitute "special circumstances" that would render it unlikely that the defendant would receive a fair trial. Whether the advantage such representation gives the government over the defendant warrants disqualification depends on the facts of the representation. Balancing the interests of protecting the defendant's rights and ensuring the fairness of the trial against the state's interests of protecting the performance of the duties of the District Attorney's Office the court may rely on a declaration by the district attorney attesting to relevant facts regarding the relationship. For example, "special circumstances" do not exist when the district attorney briefly represented a witness ten years ago on an unrelated matter, had no significant contact with the former client since, and where the community is small, rendering it likely that a local defense-attorney-turned-district attorney will have contacts with people in the community. On the other hand, "special circumstances" do exist when the witness is likely to play a critical role in the prosecution, the district attorney had a longstanding relationship with the former-client-turned-witness, the relationship ended shortly before the current prosecution, or there are ongoing contacts between the former client and district attorney, for example, due to unpaid fees.

C. "Special Circumstances" and Imputed Disqualification

Next, a court would need to consider whether disqualification of a district attorney warrants disqualification of the entire District Attorney's

159. 373 U.S. 83 (1963).

160. *Lincoln*, 161 P.3d at 1281 ("A trial court can ask for and accept a prosecuting attorney's assurance that he or she has diligently reviewed the facts and circumstances of the prior representation and there is no exculpatory information required to be revealed by the constitution, statutes, and case law. This is so because, like all attorneys, the prosecuting attorney as an officer of the court must not lie or misrepresent facts to the court . . . . In addition, as a duty of office, a prosecutor, who wishes to continue prosecuting the case, must disclose to the court that he or she has exculpatory information and reveal that information if ordered to do so by the court.") (citations omitted).

Office. ABA Committee on Ethics and Professional Responsibility, Formal Opinion 342 sets the stage for relaxed imputed disqualification of government attorneys.[161] The Committee held that disqualification of a former government attorney should not usually lead to the disqualification of the governmental agency in question.[162] It reasoned that the nature of the relationships between governmental attorneys, specifically the lack of a common shared interest in financial success contrasted with private lawyers practicing in a firm, allows for a more lax disqualification rule.[163] It concluded that a governmental agency need not be disqualified if the tainted attorney is appropriately screened.[164] The Opinion was adopted in *United States v. Caggiano*,[165] in which the Sixth Circuit Court of Appeals held that "when the individual attorney is separated from any participation on matters affecting his former client, 'vicarious disqualification of a government department is not necessary or wise.'"[166]

In *People v. Choi* the California Court of Appeals held that the "fair trial" analysis under section 1424 is applicable to the issue of imputed disqualification. That is, it found that in deciding whether to acknowledge a screen or disqualify an entire District Attorney Office, the court must assess the impact on the likelihood of the defendant receiving a fair trial.[167]

Colorado courts follow both Opinion 342 and *Caggiano* with regard to generally allowing effective screens within governmental agencies in lieu of disqualification of the entire department, and *Choi* in terms of deciding whether to impute a conflict to the entire District Attorney's Office or allow a screen based on an analysis of "special circumstances" and "fair trial." In *Chavez* the Colorado Supreme Court held that a properly drafted screening policy is relevant to the court's assessment of whether "special circumstances" require the disqualification of the entire office.[168] It found that "if the screening policy is adequate, then no disqualification [of the entire office] is necessary."[169] If the screening policy is inadequate, no immediate disqualification follows, rather, the court then must "determine whether confidential information from a prior rep-

161. 62 A.B.A. J. 517 (1976). The committee found that compelling policy considerations justify drawing a distinction between private and governmental lawyers for purposes of disqualification and held that a special, more lax government-friendly disqualification rule should apply to the latter attorneys. *Id.* at 518-20.

162. *Id.* at 521.

163. *Id.*

164. *Id.*

165. 660 F.2d 184 (6th Cir. 1981).

166. *Id.* at 191 (citing ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 342 (1975)). The court sustained the disqualification of the individual defense attorney-turned district attorney and reversed the disqualification of the entire district attorney's office.

167. 94 Cal. Rptr. 2d 922, 926-28 (Cal. Ct. App. 2000). The court affirmed the trial court's disqualification of the entire office.

168. 139 P.3d 649, 654 (Colo. 2006).

169. *Id.*

resentation nevertheless *has been* and can continue to be adequately screened from others *actually* prosecuting the case."[170] In other words a conflict of interest and inadequate screening are not sufficient to warrant disqualification of the entire office. Instead, the key issue is whether confidential information can be screened not from all attorneys in the office but only from those actually prosecuting the defendant. In *Manzanares*, the court reiterated that a "properly drafted screening policy is indeed relevant to the determination of whether disqualification is necessary to ensure the defendant receives a fair trial,"[171] and remanded to the trial court to determine whether in fact confidential information has been and can continue to be protected.[172]

While a conflict of interest and an inadequate screening policy do not automatically lead to disqualification of the entire District Attorney's Office, a defective policy would place on the District Attorney's Office a higher burden of proving that no confidential information and other information benefiting the government regarding the former-client-turned-witness had been shared by the conflicted district attorney, and mere assurances by members of the Office would not be enough.

Specifically, while a declaration made by a district attorney assuring the court that all exculpatory information relating to a former-client-turned-witness has been revealed to the defendant or that no such exculpatory information required to be revealed exists would usually suffice without more to avoid disqualification,[173] the Colorado Supreme Court held in *Chavez* and *Manzanares* that such declaration would not be sufficient to prevent disqualification of the entire District Attorney's Office if a conflict exists and the screening policy is inadequate. Under such circumstances, the court required "something more" than the testimony or assertions of members of the District Attorney's Office.

> We note that the testimony of members of the District Attorney's Office alone would not mitigate any "special circumstances" present in this case.... [E]vidence of sharing of confidential information within the District Attorney's Office, "being under the control of the prosecution, would be well-nigh impossible for a defendant to bring forth."[174]

Similarly, evidence of sharing of confidential information and other information benefiting the government regarding the former-client-turned-witness by the conflicted district attorney would be "well-nigh

170. *Id.* at 654-55 (emphasis added).
171. *Id.* at 659.
172. *Id.*
173. *See supra* notes 163-64.
174. People v. Manzanares, 139 P.3d 655, 659 (Colo. 2006) (citations omitted).

impossible" for a defendant or the former-client-turned-witness to bring forth.[175]

Disqualification of a district attorney due to representation of a former-client-turned-witness for the government should not normally lead to the disqualification of the entire District Attorney's Office. Unlike representation of the defendant, the main concern regarding a former-client-turned-witness is not the passing of relevant confidential information but rather the advantage the government would yield from the former relationship. That advantage is the result of the relationship between the former defense attorney-turned-district attorney and the former-client-turned-witness. Thus effective screening of the district attorney in question would normally address the underlying concern by eliminating the advantage to the government while affirming the policy analysis of Opinion 342 and *Caggiano*.

III. RECENT COLORADO EXPERIENCE

In two separate cases, the Mesa County District Attorney's Office charged the defendant with criminal attempt to commit first degree murder, first degree assault and vehicular eluding.[176] Two prosecutors assigned to these cases, Richard Tuttle and Tammy Eret, previously acted as principal shareholders in a private law firm, Tuttle, Eret and Rubenstein, P.C. ("TER").[177]

In the pending cases against defendant, the prosecution endorsed over two hundred witnesses.[178] After learning that three of the endorsed

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175. Indeed, the trial court in *Lincoln* found that:

> Further, even if they declare that all exculpatory has been disclosed, as they have done, the guidelines enunciated in *Chavez* and *Manzanares* would necessitate something more than the testimony or assertions of the members of the District Attorney's Office in order to mitigate the "special circumstances" evidenced... The required "something more" has not been provided here. There is no written conflict screening policy, the oral screening policy is nebulous and therefore inadequate, and no attempt at a "Chinese wall" to screen those with confidential information has been made.

Supplemental Clarifying Order, People v. Lincoln, Nos. 05 CR 2027, 05 CR 2093, at *6 (D. Colo. Mar. 14, 2007) (on file with author).

176. People v. Lincoln, 161 P.3d 1274 (Colo. 2007). The first incident occurred on November 23, 2005, when defendant allegedly attempted to murder a fellow meth user. *Id.* at 1276. Several days later, on December 1, 2005, defendant allegedly fired shots at two Mesa County Sheriff's deputies as they were attempting to pull over his car after a week-long manhunt. *Id.* at 1276-77. Defendant, 25, is in prison for aggravated robbery. *See* Nancy Lofholm, *Family Finds Solace in Offering Hope, Warmth to Wayward Son*, DENVER POST, Nov. 9, 2006, at B-01, *available at* http://www.denverpost.com/search/ci_4627495. His conviction and the pending charges all stem from an alleged methamphetamine-fueled rampage in 2005. *Id.*

177. *Lincoln*, 161 P.3d at 1277 ("Tuttle and Eret served as district attorneys in Mesa County until 2002 when they left to open TER. The firm closed in December 2004 and Tuttle and Eret returned the District Attorney's Office. Dan Rubenstein also acted as a principal shareholder in TER and returned to the Mesa County District Attorney's Office at the same time as Tuttle and Eret. Rubenstein was not assigned to prosecute defendant's pending cases, but did act as a Chief Deputy District Attorney in Mesa County. The record is unclear about whether Rubenstein has any role connected with the prosecution of Lincoln's cases.").

178. *Id.* at 1277.

witnesses were previously represented by TER in unrelated matters,[179] defendant filed discovery motions seeking, inter alia, potentially exculpatory information concerning those former clients which could be used in cross-examination to question the credibility of the clients-turned witnesses.[180] Tuttle, Eret and the District Attorney's Office objected to these discovery motions, and in a related court hearing Mr. Tuttle represented that he did not know of any potentially exculpatory information that needed to be disclosed.[181] Defendant then moved to disqualify Tuttle, Eret and the District Attorney's Office pursuant to the Colorado disqualification statute and in the alternative pursuant to the court's inherent power on the basis that the involved prosecutors were unwilling or unable to provide potentially exculpatory information about their former clients, and because there was no way to ascertain whether Tuttle's claim of no potentially exculpatory evidence was accurate.[182]

The trial court did not generally decide when representation of former-clients-turned-witnesses will constitute "special circumstances" and lead to disqualification of a district attorney, but appropriately focused its attention on the specific claims raised by defendant, namely the inability of the prosecutors to reply to the discovery motions filed by defendant and the inability of the court to ascertain whether the prosecutors' claims of possessing no potentially exculpatory evidence were accurate.[183]

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179. *Id.* ("Sheriff's Deputy Michael Miller, a named victim in the second case, was represented by Eret in a contested domestic relations case, which concluded in 2004. A second witness, Corey Winkel, was represented by Eret in a 2002 felony marijuana distribution prosecution. TER was not fully paid for its legal services and turned the debt over to a collection agency in 2003. According to the record, the debt is still outstanding. In addition, [in 2006 Winkel was prosecuted by Tuttle, after Tuttle returned to the District Attorney's Office for a felony accessory charge related to the first pending case against defendant.] [A] third witness, Robert Thorpe, and several members of his family were represented by TER on a variety of business and personal matters between 2002 and 2004. Thorpe's daughter was prosecuted by the Mesa County District Attorney's Office on an unrelated charge in 2005 after Tuttle and Eret returned to that Office. Eret was involved in the review, charging and oversight of the prosecution of Thorpe's daughter, but she did not personally prosecute the case."). Thorpe and his family objected to the District Attorney's Office prosecution of the case filing their own request for a special prosecutor, which motion was ultimately denied. People *ex rel.* E.L.T., 139 P.3d 685, 685-88 (Colo. 2006).

180. *Id.*

181. *Id.*

182. *Id.* at *4; *see also* Mike Wiggins, *Lincoln to Seek Special Prosecutor*, GRAND JUNCTION DAILY SENTINEL, Jan. 30, 2007, at B-1. The defendant moved to disqualify the district attorneys and the District Attorney's Office based on representation of witnesses in the case only after the government moved to disqualify a defense attorney on the same ground - that he previously represented witnesses in the case against defendant. *See* Mike Saccone, *Motion May Delay Trial in Murder Attempt Case*, GRAND JUNCTION DAILY SENTINEL, Dec. 31, 2006, at B-8. Subsequently, Lincoln dismissed the defense attorney in question, rendering the People's disqualification motion moot. *See* Mike Saccone, *Suspect Dismisses Attorney*, GRAND JUNCTION DAILY SENTINEL, Jan. 6, 2007, at B-1.

183. Clarifying Order, *supra* note 175. The issue of first impression was not presented to the trial court as such. Rather than explicitly asserting that the Colorado disqualification statute authorized disqualification of district attorneys who represented former-clients-turned-witnesses and, in the alternative, that courts should exercise their inherent power to disqualify district attorney's in these circumstances, the defendant in *Lincoln* narrowly argued that the district attorneys' failure or inabil-

The trial court mistakenly held that district attorneys owe their former clients-turned-witnesses a duty of confidentiality that bars them from revealing any information about their former clients, let alone potentially exculpatory information,[184] that the confidentiality duty conflicts with the district attorneys' duty to reveal exculpatory information and concluded that the conflict results in an "irresolvable dilemma."[185] Moreover, the trial court held that the confidentiality duty owed to clients-turned-witnesses precludes the district attorneys from even divulging that they know of no exculpatory information related to prosecution and consequently that there is no way to assess whether such potentially exculpatory evidence exists.[186] The trial court concluded that the district attorneys' inability to reveal exculpatory evidence and the inability to assess its existence constitute "special circumstances" warranting disqualification under the statute.[187]

Next, the trial court asserted its inherent authority to protect the integrity of the court's fact-finding process and it disqualified the district attorneys, holding:

> The court cannot countenance the withholding of potentially material and exculpatory evidence, nor can it allow the public to have the impressions that legal ethics [rules] are enforced only when it is convenient to do so, that legal ethics [rules] do not apply to prosecutors, or that prosecutors can withhold or use confidential information to their advantage.[188]

The appearance of impropriety finding was based on two related legs: the impression of non-disclosure of exculpatory information and the impression that the rules of ethics such as confidentiality do not apply to prosecutors.

Finally, finding that "[t]here is no written conflict screening policy, the oral screening policy is nebulous and therefore inadequate, and no attempt at a 'Chinese wall' to screen those with confidential information has been made," the trial court imputed an "irresolvable dilemma" and disqualified the entire District Attorney's Office.[189]

The trial court's opinion established a very broad standard for disqualification of district attorneys who represented witnesses for the gov-

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ity to respond to discovery requests warranted disqualification. The trial court thus appropriately decided the narrow issue before it.

184. *Id.* at *5. To be sure, district attorney's do owe their former clients a duty of confidentiality, but whether the duty bars revealing information, or in other words, whether an exception applies, requires an analysis of COLO. RULES OF PROF'L CONDUCT 1.6(b) (2007).

185. *Id.* at *5-6.

186. *Id.*

187. *Id.* ("Neither the People's non-disclosure nor their use of any such confidential information must create an advantage to the government or disadvantage to the criminal defendant.")

188. *Id.* at *6.

189. *Id.*

ernment. What the trial court called an "irresolvable conflict" was in fact an irrebuttable presumption: that confidentiality duties to their former clients-turned-witnesses precluded district attorneys from disclosing possibly exculpatory information to the defendant, and therefore the defendant would be at a disadvantage and the district attorneys must be disqualified. As a result, every district attorney who represented a witness for the government faced an irresolvable and irrefutable conflict and would be disqualified.[190] The opinion caused a stir. Among others, the Attorney General filed an amicus brief in which he characterized the broad holding of the court as intruding "unnecessarily on the authority the people of Colorado have vested in local district attorneys through statute and the Constitution."[191]

The People filed an interlocutory appeal with the Colorado Supreme Court.[192] The court reversed and remanded.[193] It correctly held that a district attorney's disclosure requirement of exculpatory evidence pursuant to both federal constitutional law and Colorado state law trumps confidentiality duties owed by the district attorney to her former clients-turned-witnesses.[194] The conflict faced by the district attorney, concluded the court, "may be a dilemma, but it is not irresolvable."[195]

The court's decision was surprisingly narrow. Suggesting that the only issue of contention in *Lincoln* was whether non-disclosure of exculpatory information gave rise to "special circumstances" under the Colorado statute, the court (correctly) held that as a matter of law exculpatory information must be disclosed, and thus, arguably disposing of the "only" issue before it, reversed and remanded the case with directions to the trial court not to disqualify the district attorneys. The court, however, ignored the important question of law raised in *Lincoln*: does the law allow for disqualification of a district attorney who represented a witness

190. This broad standard had the peculiar result of automatically disqualifying district attorneys who represented clients-turned-witness, while not automatically disqualifying district attorneys who represented the defendant.

191. Brief for Colorado District Attorney's Council, *supra* note 66, at 6; *see also* Mike Saccone, *Attorney General to Support DA's Appeal*, GRAND JUNCTION DAILY SENTINEL, Mar. 17, 2007, at A-1.

192. Pursuant to COLO. REV. STAT. ANN. § 16-12-102(2) (West 2007) and COLO. REV. STAT. ANN. § 20-1-107(3) (West 2007).

193. People v. Lincoln, 161 P.3d 1274, 1282 (Colo. 2007).

194. *Id.* at 1279-81. The court concluded:

> The accused's due process right to a fair trial and the constitution, statutory, and ethical rules require a prosecuting attorney, if she or he wishes to remain on the case, to disclose exculpatory information even if it was obtained from a prior representation. In this situation, a prosecuting attorney has several options. She or he may obtain consent from the prior client waiving attorney-client confidentiality and authorizing disclosure of the exculpatory information. If consent is not obtained, she or he may (1) disqualify from prosecuting the accused and be screened from the office's prosecution of the case or (2) proceed with the prosecution, disclose to the court that she or he has exculpatory information, and reveal the information to the defense upon order of the Court.

Id. at 1281.

195. *Id.* at 1281.

for the government? Instead, the court merely cited its own case law construing "special circumstances" under the Colorado statute, which only deals with the disqualification of a district attorney who represented the defendant and fails to explore representation of clients-turned-witnesses. To be sure, ignoring the broader question of law was plausible based on a narrow reading of the trial court's order as disqualifying the district attorneys pursuant to the statute solely on the ground of non-disclosure of exculpatory information. Nonetheless, the court passed on an opportunity to decide a first impression question of law and failed to explore the circumstances under which the Colorado statute allows for disqualification of a district attorney who represented a witness for the government.

Worse, the Colorado Supreme Court ignored the issue of whether pursuant to its inherent powers a court may disqualify a district attorney who represented a witness for the government. The court's omission was peculiar: the defendant clearly raised the issue and sought disqualification based on the court's inherent powers in addition to invoking the disqualification statute, the trial court explicitly invoked its inherent powers in disqualifying the district attorney, and even the Attorney General explored the issue in detail in its amicus brief. Why the court ignored an issue clearly before it is unclear. Arguably, the court decided to avoid the issue because in asserting exclusive authority over district attorneys the Colorado statute is unconstitutional and deciding the issue would have required the court to strike this element of the statute down and pick a fight with the Colorado legislature. Moreover, deciding the issue would have required the court to explore the traitorous grounds of courts' inherent powers, a subject matter courts inside and outside of Colorado have been systematically avoiding.

The court's refusal to construe the Colorado disqualification statute and the inherent powers doctrine in the context of former representation of former-clients-turned-witnesses not only obscured this important legal question,[196] but also deprived the defendant of his "day in court" with regard to exploring the disqualification of involved district attorneys pursuant to the Colorado statute. Finally, the court left former-clients-turned-witnesses exposed to the possibility of being forced to testify and forced to waive confidentiality, without providing the trial court with the opportunity to consider all the relevant circumstances and act consistent with the interests of justice and preserving the integrity of the fact-finding in the case. Deciding *Lincoln* consistent with the standards established above would have allowed the court to remand the case to the trial court to determine whether the representation of former-clients

196. For example, the court's narrow opinion in *Lincoln* might erroneously be construed to mean that when a district attorney discloses exculpatory evidence no "special circumstances" exist. As demonstrated, however, mere disclosure of exculpatory evidence does not automatically and conclusively put to rest concerns regarding unfairness to the defendant.

Miller, Winkel and Thorpe constituted "special circumstances" warranting the disqualification of the district attorneys involved in the case; and, as importantly, to determine whether protecting the confidentiality interests of Miller, Winkel and Thorpe justified disqualification pursuant to the court's inherent powers.

CONCLUSION

Courts' exercise of inherent powers and disqualification statutes are two arenas in which the executive, legislative and judicial branches battle over the regulation and control of the District Attorney's Office. A state of "happy indeterminacy" with regard to the exercise of inherent powers, and judicial deference to the other two branches with regard to the construction of disqualification statutes may—from the perspective of the state and the courts—appropriately resolve allocating power and authority among the competing branches of government. However, in the context of disqualification of district attorneys whose former clients become government witnesses, this state of affairs harms defendants who are unable to disqualify district attorneys notwithstanding the possible existence of "special circumstances" that may render the trial unfair, and it harms former clients who become government witnesses and are unable to prevent disclosure of their confidential information.

In the context of this battle, the article advances the law of disqualification between the courts and the state. First, it explores the circumstances under which courts, in order to protect the confidentiality interests of former-clients-turned-witnesses, should exercise their inherent power to disqualify a district attorney whose former client has become a witness for the government even when the disqualification statute will not allow disqualification. Second, it proposes an interpretation of "special circumstances" which appropriately strikes a balance between protecting defendants' right to a fair trial against the state's legitimate interests of effectively pursuing law and order through the Office of the District Attorney and explores the circumstances under which this standard should result in the disqualification of the district attorney.

PREACHING, FUNDRAISING AND THE CONSTITUTION: ON PROSELYTIZING AND THE FIRST AMENDMENT

MARK STRASSER†

INTRODUCTION

In a series of cases in the late 1930s and early 1940s, the United States Supreme Court recognized that proselytizing, even when including attempts to raise money, is a paradigmatic example of religious activity and is constitutionally protected when performed by private actors. The Court recently reaffirmed that approach in *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton.*[1] Yet, the Court's attitudes towards proselytizing and religious fundraising become much more difficult to discern when one also considers cases involving the International Society for Krishna Consciousness (ISKCON).

Members of the Court have implied that the apparent inconsistency in the jurisprudence can readily be explained if one considers the differing roles played by the government in these cases. However, that is false. The jurisprudence is much more confused in this area than the Court or commentators would have one believe, even if one factors in the government's varying roles in these cases. The Court is of at least two minds both with respect to whether religious speech should simply be treated as any other form of protected speech and with respect to whether fundraising for religion is afforded robust constitutional protection.

Part I of this Article discusses the door-to-door solicitation line of cases, noting the robust protections which the Court implies are constitutionally guaranteed. Part II discusses the major opinions involving ISKCON, in which the Court differentiates between proselytizing and religious fundraising, suggesting that the former must be protected while upholding the government's policies limiting or prohibiting the latter. This part explores some of the possible explanations for this apparent differential treatment, explaining why these rationales cannot account for this apparent inconsistency. The Article concludes that this differential treatment can be explained, at least in part, by the Court's own ambivalence with respect to whether religious speech and practice must be treated differently than other kinds of speech and practices, and with respect to whether religious fundraising should indeed be treated as religious speech.

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1. Watchtower Bible and Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150 (2002).

I. WITNESSES AND THE CONSTITUTION

In a series of cases beginning about seventy years ago, the Court made clear that proselytizing—attempting to convert individuals from one religious belief to another,[2] which may but need not include fund-raising[3]—is protected constitutional activity when performed by private actors.[4] Sometimes, the Court treats private proselytizing as a subset of the general category of private speech afforded First Amendment protection.[5] At other times, however, members of the Court suggest that it has special protection precisely because it involves religious expression. The Court's ambivalence about this issue is suggested but rarely discussed explicitly in many of its opinions, perhaps because this line of cases can arguably be explained in terms of speech considerations alone. Thus, one cannot tell in this line of cases whether the fact that *religious* proselytizing is at issue plays any role in the constitutional analysis, although members of the Court consistently hint that it does.

A. Proselytizing and the State

One of the seminal proselytizing cases is *Lovell v. City of Griffin*,[6] in which Alma Lovell was convicted of distributing literature without a permit.[7] She did not deny that she had committed the action alleged,[8] but instead claimed that the ordinance was unconstitutional because it

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2. *See* Snyder v. Murray City Corp., 159 F.3d 1227, 1234 n.10 (10th Cir. 1998).

3. *Cf.* Howard O. Hunter & Polly J. Price, *Regulation of Religious Proselytism in the United States*, 2001 BYU L. REV. 537, 538-39 (2001) ("We use the term 'proselytism' here to include speech and associated conduct involved in spreading the word of God and persuading others to convert or to follow the message delivered by the person or group of persons engaged in proselytism . . . . The focus is on preaching, soliciting, canvassing, distributing tracts, and other methods of persuasion and teaching about one's religion.").

4. David M. Smolin, *Exporting the First Amendment?: Evangelism, Proselytism, and the International Religious Freedom Act*, 31 CUMB. L. REV. 685, 686 (2000-2001) ("[T]he question of restricting evangelism/proselytism is a 'no-brainer' within the American context, at least so long as such activities are not conducted in public schools or by governmental officials operating in their official capacities. Few question the right of private citizens to engage in speech designed to persuade others to adopt a certain religion, and even fewer would limit the right to change one's religion.") (footnote omitted); Richard W. Garnett, *Changing Minds: Proselytism, Freedom, and the First Amendment*, 2 U. ST. THOMAS L.J. 453, 457 (2005) ("[T]he [First] Amendment is well understood as protecting and celebrating not just expression but persuasion—or, if you like, proselytism.").

5. Hunter & Price, *supra* note 3, at 539 ("Courts in the United States have treated proselytism as a form of free speech within the coverage of the First Amendment to the United States Constitution.").

6. 303 U.S. 444 (1938).

7. *Id.* at 447. The ordinance at issue said

> [t]hat the practice of distributing, either by hand or otherwise, circulars, handbooks, advertising, or literature of any kind, whether said articles are being delivered free, or whether same are being sold, within the limits of the City of Griffin, without first obtaining written permission from the City Manager of the City of Griffin, such practice shall be deemed a nuisance, and punishable as an offense against the City of Griffin.

Id.

8. *See id.* at 448.

abridged the freedom of the press and her right to the free exercise of her religion.[9]

When analyzing the implicated constitutional guarantees, the *Lovell* Court noted that "[f]reedom of speech and freedom of the press . . . are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action."[10] After noting that the prevention of prior restraint was "a leading purpose in the adoption of the constitutional provision"[11] and suggesting that the ordinance's "character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship,"[12] the Court struck down the statute.[13] The Court expressed special concern about the breadth of the ordinance, which prohibited the "distribution of literature of any kind at any time, at any place, and in any manner."[14] Perhaps equally worrisome was that the ordinance required those seeking to distribute literature to obtain a permit from the City Manager[15] without any specification concerning the criteria to be used by that manager when deciding whether to issue a permit.[16] In striking down the ordinance based on these concerns, the Court sounded themes which are commonplace in First Amendment cases—the importance of assuring that ordinances targeting speech are not overbroad[17] and the importance of not giving officials unfettered discretion with respect to which kinds of speech will be permitted.[18]

Almost as an afterthought, the Court indirectly noted that permit requirements can impose special burdens on certain religious groups. In explaining why Lovell had never even applied for a permit, the Court noted that "she regarded herself as sent 'by Jehovah to do His work' and that such an application would have been 'an act of disobedience to His

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9. *Id.*
10. *Id.* at 450.
11. *Id.* at 451-52.
12. *See id.* at 451.
13. *See id.*
14. *Id.*
15. *Id.*
16. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 537-538 (1981) ("According such wide discretion to city officials to control the free exercise of First Amendment rights is precisely what has consistently troubled this Court in a long line of cases starting with *Lovell v. Griffin*, 303 U.S. 444, 451 (1938)."); *see also* Kunz v. New York, 340 U.S. 290, 293-94 (1951) (striking down an ordinance giving the police commissioner unlimited discretion with respect to whether a permit would be issued for a meeting for public worship).
17. Indeed, limiting the breadth of statutes and their possible chilling effects are thought to be so important that statutes may be struck down even if the individual challenging the statute engaged in unprotected speech. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 237 (2002) ("[O]verbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.").
18. *Cf.* Schall v. Martin, 467 U.S. 253, 306-307 (1984) ("A principle underlying many of our prior decisions in various doctrinal settings is that government *officials* may not be accorded *unfettered* discretion in making decisions that impinge upon fundamental rights.") (emphasis added).

commandment.'"[19] Thus, in Lovell's view, the very act of asking a civil authority for permission to do God's work would be a violation of conscience.[20]

While implicitly admitting that permit requirements might interfere with religious exercise, the *Lovell* Court did not address the constitutionality of requiring individuals to seek permits before they would be allowed to engage in religiously inspired activity.[21] That issue was addressed in *Cantwell v. Connecticut*.[22]

B. State Licensing

At issue in *Cantwell* was a statute requiring individuals to obtain a certificate before they could solicit funds in support of their religion.[23] The Court suggested that it was permissible to regulate solicitation to protect the public against fraud, even if such regulation might also affect efforts to solicit funds for religious causes.[24] The defect in the Connecticut statute was that it permitted the secretary of public welfare to determine which causes were religious in nature, which would determine whether the solicitation would be permitted.[25]

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19. *Lovell*, 303 U.S. at 448.

20. *See* Hunter & Price, *supra* note 3, at 541 ("The ordinance required that anyone who sought to distribute 'circulars, handbooks, advertising, or literature of any kind' first had to obtain a permit from the city manager. Lovell did not do so for religious reasons. She was called by God to spread the word and she needed no permit from a secular authority. Indeed, in her religion's view, to seek a permit would have been an insult to God.").

21. The Court was able to sidestep this issue because the ordinance was void on its face. *See Lovell*, 303 U.S. at 452-53 ("As the ordinance is void on its face, it was not necessary for appellant to seek a permit under it. She was entitled to contest its validity in answer to the charge against her.").

So, too, *Cox v. New Hampshire*, 312 U.S. 569 (1941), did not settle whether free exercise rights are implicated by a statute requiring individuals to get a permit before proselytizing, notwithstanding that the case involved Jehovah's Witnesses who had been prosecuted for and convicted of failing to get a permit before engaging in expressive activity. *See id.* at 570-71; *see also* Hunter & Price, *supra* note 3, at 542-43 (noting that in *Cox*, the "Witnesses had refused to seek a permit for the same reason as Alma Lovell—they were following God's mandate to spread the word and they needed no human permission to do so").

The sole charge against the appellants in *Cox* had been that they had engaged in a parade without a permit. *See Cox*, 312 U.S. at 573. As the *Cox* Court made clear, "[t]hey were not prosecuted for distributing leaflets, or for conveying information by placards or otherwise, or . . . for maintaining or expressing religious beliefs." *Id.* Thus, the Court was not even forced to discuss whether requiring a permit was itself an undue infringement of religious rights.

22. 310 U.S. 296 (1940).

23. *See id.* at 304 ("If a certificate is procured, solicitation is permitted without restraint but, in the absence of a certificate, solicitation is altogether prohibited.").

24. *Id.* at 305 ("The general regulation, in the public interest, of solicitation . . . is not open to any constitutional objection, even though the collection be for a religious purpose.").

25. *Id.* ("[T]he Act requires an application to the secretary of the public welfare council of the State; . . . he is empowered to determine whether the cause is a religious one, and . . . the issue of a certificate depends upon his affirmative action. If he finds that the cause is not that of religion, to solicit for it becomes a crime . . . . He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth."); *see also* Schneider v. New Jersey, 308 U.S. 147, 164 (1939) ("Conceding that fraudulent appeals may be made in the name of charity and religion, we

One of the issues addressed by the *Cantwell* Court was whether Cantwell, a Jehovah's Witness,[26] had been guilty of inciting violence.[27] The Court explained that when Cantwell's Catholic listeners[28] grew angry after Cantwell had played a phonograph record attacking the Catholic Church, they had asked him to leave and he had complied with their request.[29] The Court concluded that his conduct did not constitute a breach of the peace.[30]

Part of the reason that his conduct did not constitute a breach involved the specific contents of the speech. While understanding that "the contents of the record not unnaturally aroused animosity,"[31] the Court distinguished what Cantwell had said and played from "provocative language which . . . consisted of profane, indecent, or abusive remarks directed to the person of the hearer." [32] The former, but not the latter, is "communication of information or opinion safeguarded by the Constitution."[33] Although the *Cantwell* Court could have concluded its analysis after noting that the speech was not profane, indecent, or abusive, it did not, instead suggesting that Cantwell's speech had to be given more leeway by the state.[34]

Cantwell is important for a few reasons. It suggests that the state will not be allowed to decide which sets of beliefs qualify as religious

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hold a municipality cannot, for this reason, require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the police to say some ideas may, while others may not, be carried to the homes of citizens; some persons may, while others may not, disseminate information from house to house. Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press.").

26. *Cantwell*, 310 U.S. at 300 ("Newton Cantwell and his two sons, Jesse and Russell, members of a group known as Jehovah's witnesses, and claiming to be ordained ministers, were arrested in New Haven, Connecticut, and each was charged by information in five counts, with statutory and common law offenses.").

27. *Id.* at 309 ("Cantwell's conduct, in the view of the court below, considered apart from the effect of his communication upon his hearers, did not amount to a breach of the peace.").

28. *See id.* at 303.

29. *Id.* ("On being told to be on his way he left their presence.").

30. *Id.* at 309.

31. *Id.* at 311.

32. *Id.* at 309.

33. *Id.* at 310.

34. *Id.* ("In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."). *Cf.* Tad Stahnke, *Proselytism and the Freedom to Change Religion in International Human Rights Law*, 1999 BYU L. REV. 251, 292 ("[P]roselytism can include criticism of the religious beliefs of a target; the unsuccessful attempt to change those beliefs is thus likely to cause injury to religious feelings. When states seek to curtail such injury by limiting proselytism, these restrictions must be carefully structured.").

and thus might be worthy of support,[35] and also that soliciting on behalf of a religion is itself protected, since that may be the only way that the religion can survive.[36] The decision further suggests that proselytizing is protected,[37] since Cantwell had been playing a record very critical of Catholicism in a neighborhood whose population was 90 percent Catholic.[38]

When suggesting that the state could require individuals to get a permit before proselytizing, the *Cantwell* Court was not thereby validating any licensing system, e.g., even one which required individuals to pay fees before they could proselytize. At issue in *Murdock v. Pennsylvania*[39] was an ordinance requiring that individuals selling merchandise within the city of Jeannette buy a license from the borough treasurer.[40] Petitioners challenging the law were Jehovah's Witnesses,[41] who went door to door distributing literature and asking people to buy religious books and pamphlets.[42] None of the individuals selling the books had obtained a license.[43]

One of the ways to analyze the implicated issues in *Murdock* is in terms of whether these transactions should be construed as sales. It was petitioners' "practice in making these solicitations to request a 'contribution' of twenty-five cents each for the books and five cents each for the pamphlets but to accept lesser sums or even to donate the volumes in case an interested person was without funds."[44] Arguably, one might treat a request for a contribution as something other than a sale, especially because the petitioners would sometimes give the materials away for free. However, the Court did not rely on the fact that petitioners were

35. *Cantwell*, 310 U.S. at 307 ("But to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.")

36. *Id.* at 305 ("[T]he secretary of the public welfare council of the State . . . is empowered to determine whether the cause is a religious one . . . . He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth.").

37. *Id.* at 302-03 ("Jesse Cantwell . . . stopped two men in the street, asked, and received, permission to play a phonograph record, and played the record 'Enemies,' which attacked the religion and church of the two men, who were Catholics.").

38. *Id.* at 301 ("On the day of their arrest the appellants were engaged in going singly from house to house on Cassius Street in New Haven. . . . Cassius Street is in a thickly populated neighborhood, where about ninety percent of the residents are Roman Catholics.").

39. 319 U.S. 105 (1943).

40. *Id.* at 106.

41. *See id.*

42. *Id.*

43. *Id.* at 107.

44. *Id. Cf.* Int'l Soc'y for Krishna Consciousness, Inc. v. Barber, 506 F. Supp. 147, 154 (N.D.N.Y. 1980) ("Whether or not the fair goer decides to purchase one of these items, the Krishna devotee will ask the fair goer to make a monetary donation. Even if the fair goer does not make a contribution, usually the Krishna devotee would permit the fair goer to keep the prasada or token, and sometimes even the more religious paraphernalia if it had been shown to the fair goer.").

merely asking for contributions or even that they would give the materials away for free on occasion. On the contrary, the Court characterized the transactions at issue as sales and then discussed the constitutionality of the Jeannette ordinance.

The Court began its analysis by admitting that it will sometimes be difficult to determine whether an activity is religious or "purely commercial,"[45] but suggested that such a distinction may be "vital,"[46] because it may make the difference between whether or not a practice can be precluded. For example, the Court suggested that the state is constitutionally permitted to prohibit the distribution of purely commercial leaflets on the streets but is not afforded similar leeway with respect to religious tracts.[47] The Court also made clear that the state cannot legally "prohibit the distribution of handbills in the pursuit of a clearly religious activity merely because the handbills invite the purchase of books for the improved understanding of the religion."[48]

Here, when suggesting that the Constitution precludes the state from prohibiting invitations to purchase books that will enhance religious understanding, the Court did not rely on the possible difference between selling something on the one hand and giving out something and then asking for a donation on the other.[49] Rather, the Court focused on the invitation to purchase written materials, i.e., an offer to sell them. The Court noted that "the mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise,"[50] reasoning that otherwise "the passing of the collection plate in church would make the church service a commercial project."[51]

Yet, this justification is unpersuasive. When one offers a product for free and then asks for a donation, one is not tying the provision of the product to the receipt of dollars—on the contrary, the product has already been transferred and the receipt of a donation will not determine the product's ownership. Indeed, where donations are anonymous (as might occur with the passing of a collection plate), the provision of the service/product to a particular person cannot depend upon whether that per-

45. *Murdock*, 319 U.S. at 110.
46. *Id.*
47. *Id.* at 110-11.
48. *Id.* at 111.
49. *Cf. id.* at 119 (Reed, J., dissenting) ("Petitioners suggest that their books and pamphlets are not sold but are given either without price or in appreciation of the recipient's gift for the furtherance of the work of the witnesses. The pittance sought, as well as the practice of leaving books with poor people without cost, gives strength to this argument. In our judgment, however, the plan of national distribution by the Watch Tower Bible & Tract Society, with its wholesale prices of five or twenty cents per copy for books, delivered to the public by the witnesses at twenty-five cents per copy, justifies the characterization of the transaction as a sale by all the state courts.").
50. *Id.* at 111.
51. *Id.*

son donated, since it simply will not be clear who donated (as long as there are some donations and those donations cannot be tied to a particular person, e.g., because they are in cash rather than by check).[52] However, if the religious product is sold and, for example, either will not be transferred or will be taken back if the individual does not pay the requested amount, the process at issue is much closer to a standard sale.[53]

Possible ways to distinguish notwithstanding, the *Murdock* Court made clear that seeking donations to support religion should be differentiated from mere commercial activities.[54] The Court noted that it is "plain that a religious organization needs funds to remain a going concern,"[55] and classified the practice of handing out religious tracts in exchange for donations as religious activity.[56] Indeed, the Court waxed eloquent when describing this activity:

> The hand distribution of religious tracts is an age-old form of missionary evangelism—as old as the history of printing presses. It has been a potent force in various religious movements down through the years. . . . It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting.[57]

The Court explained that the Constitution affords significant protection for this practice, pointing out that this "form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits."[58]

The *Murdock* Court likened taxing these sales to the taxing of the exercise of other First Amendment freedoms and held the tax unconstitutional,[59] characterizing the ordinance as requiring "religious colporteurs

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52. *Cf.* Calvin H. Johnson, *Was It Lost?: Personal Deductions Under Tax Reform*, 59 SMU L. REV. 689, 706 (2006) ("The preacher was paid by passing the collection plate and, at least in theory, contributions into the plate were voluntary. Payments into the collection plate are, thus, considered a loss without quid pro quo. One might protest that passing the hat works just as well to pay for the services as a ticket, pew rent, or other explicit one-to-one payment arrangement, but if the service is available for nothing, then the donation into the plate is considered a loss to the payor.").

53. *Cf.* Stahnke, *supra* note 34, at 263 (suggesting that some religious "activities could be described in a more commercial vein, such as selling or soliciting orders for books or other merchandise").

54. *See also* Jamison v. Texas, 318 U.S. 413, 417 (1943) ("The state can prohibit the use of the street for the distribution of purely commercial leaflets, even though such leaflets may have 'a civic appeal, or a moral platitude' appended. They may not prohibit the distribution of handbills in the pursuit of a clearly religious activity merely because the handbills invite the purchase of books for the improved understanding of the religion or because the handbills seek in a lawful fashion to promote the raising of funds for religious purposes." (citing Valentine v. Chrestensen, 316 U.S. 52, 55 (1942))).

55. *Murdock*, 319 U.S. at 111.

56. *See id.* at 109.

57. *Id.* at 108-09.

58. *Id.* at 109.

59. *Id.* at 108 ("The First Amendment, which the Fourteenth makes applicable to the states, declares that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . . .' It could hardly be

to pay a license tax as a condition to the pursuit of their activities,"[60] and comparing the tax at issue to a tax on a preacher for the privilege of giving a sermon.[61] This, the Court suggested, could not be done, even though it would be constitutional to "impose a tax on the income or property of a preacher."[62] The *Murdock* Court alluded to a central concern articulated in *McCulloch v. Maryland*[63] by suggesting that were the constitutionality of the taxes at issue upheld, taxes might be imposed that would make it impossible for a particular religious practice to continue. The *Murdock* Court explained:

> Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance. Those who can tax the privilege of engaging in this form of missionary evangelism can close its doors to all those who do not have a full purse. Spreading religious beliefs in this ancient and honorable manner would thus be denied the needy.[64]

Not only might such taxes impose a severe burden on relatively poor religious groups but such taxes might have particularly onerous implications for itinerant preachers, who might be taxed wherever they preached and might then find the taxes too burdensome to permit them to continue their preaching.[65] However, the Court made clear in *Follett v. Town of McCormick*[66] that the *Murdock* protections also applied to non-itinerant preachers.[67]

C. Free Speech or Something More?

In *Martin v. City of Struthers*,[68] Thelma Martin challenged her conviction for distributing handbills at residences in violation of a local ordinance.[69] She pled that the ordinance violated the "right of freedom of

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denied that a tax laid specifically on the exercise of those freedoms would be unconstitutional. Yet the license tax imposed by this ordinance is in substance just that.").

60. *Id.* at 110.

61. *Id.* at 112.

62. *Id.*

63. 17 U.S. 316, 327 (1819) ("An unlimited power to tax involves, necessarily, a power to destroy . . . .").

64. *Murdock*, 319 U.S. at 112; *see also* Follett v. Town of McCormick, 321 U.S. 573, 579 (1944) (Murphy, J., concurring) ("It is wise to remember that the taxing and licensing power is a dangerous and potent weapon which, in the hands of unscrupulous or bigoted men, could be used to suppress freedoms and destroy religion unless it is kept within appropriate bounds.").

65. *See Murdock*, 319 U.S. at 115 ("Itinerant evangelists moving throughout a state or from state to state would feel immediately the cumulative effect of such ordinances as they become fashionable. . . . This method of disseminating religious beliefs can be crushed and closed out by the sheer weight of the toll or tribute which is exacted town by town, village by village. The spread of religious ideas through personal visitations by the literature ministry of numerous religious groups would be stopped.").

66. 321 U.S. 573.

67. *Id.* at 577 ("A preacher has no less a claim to that privilege when he is not an itinerant.").

68. 319 U.S. 141 (1943).

69. *Id.* at 142. The ordinance read:

press and religion as guaranteed by the First and Fourteenth Amendments."[70] When striking down the ordinance,[71] the *Martin* Court analyzed the issue before it as it might have analyzed any claim involving free speech, noting that the "authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance."[72] However, Justice Murphy in his concurrence suggested that religious expression was entitled to special protection—"nothing enjoys a higher estate in our society than the right given by the First and Fourteenth Amendments freely to practice and proclaim one's religious convictions."[73] That protection was extended to expression which was "aggressive and disputatious as well as to the meek and acquiescent."[74]

At issue in *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*[75] was an ordinance requiring individuals to get permits from the mayor before going to residences to promote causes.[76] There was no charge for the permit,[77] and the permits would be issued routinely once the applicant had filled out a fairly detailed form.[78]

The ordinance was challenged on its face and the Court examined its constitutionality "not only as it applies to religious proselytizing, but also to anonymous political speech and the distribution of handbills."[79] The petitioners, who had never applied for a permit[80] because they considered doing so as almost an insult to God,[81] offered "religious literature

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> It is unlawful for any person distributing handbills, circulars or other advertisements to ring the door bell, sound the door knocker, or otherwise summon the inmate or inmates of any residence to the door for the purpose of receiving such handbills, circulars or other advertisements they or any person with them may be distributing.

Id.

70. *Id.*

71. *Id.* at 149 ("[W]e conclude that the ordinance is invalid because in conflict with the freedom of speech and press.").

72. *Id.* at 143.

73. *Id.* at 149 (Murphy, J., concurring); *see also* Kunz v. New York, 340 U.S. 290, 311 (1951) (Jackson, J., dissenting) ("The purpose of the Court is to enable those who feel a call to proselytize to do so by street meetings.").

74. *Martin*, 319 U.S. at 149 (Murphy, J., concurring).

75. Watchtower Bible and Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150 (2002).

76. *Id.* at 154 ("[A]ny canvasser who intends to go on private property to promote a cause must obtain a "Solicitation Permit" from the office of the mayor.").

77. *Id.* ("[T]here is no charge for the permit.").

78. *Id.* at 154-55 (noting that the permit "is issued routinely after an applicant fills out a fairly detailed 'Solicitor's Registration Form'").

79. *Id.* at 153.

80. *Id.* at 156 ("Petitioners did not apply for a permit.").

81. *Id.* at 157-58 ("Although Jehovah's Witnesses do not consider themselves to be 'solicitors' because they make no charge for their literature or their teaching, leaders of the church testified at trial that they would honor 'no solicitation' signs in the Village."). They also explained at trial that they did not apply for a permit because they derive their authority to preach from Scripture. *Id.* at 158 ("For us to seek a permit from a municipality to preach we feel would almost be an insult to God.").

without cost to anyone interested in reading it."[82] They claimed that they did not "solicit contributions or orders for the sale of merchandise or services,"[83] although they were willing to accept donations.[84]

The Village argued that it had legitimate interests which were served by the ordinance—the protection of privacy and the prevention of fraud and crime.[85] While accepting that these were important interests,[86] the Court nonetheless was not persuaded by the Village's argument. The Court noted its long history of invalidating door-to-door canvassing restrictions as part of its analysis,[87] commenting that it was no accident that "most of these cases involved First Amendment challenges brought by Jehovah's Witnesses, because door-to-door canvassing is mandated by their religion."[88] Further, the Court made clear that its decision to invalidate the statute did not depend on the claim that funds were not being solicited,[89] explaining that because of the lack of "significant financial resources, the ability of the Witnesses to proselytize is seriously diminished by regulations that burden their efforts to canvass door-to-door."[90] The Court distinguished what was before it from, for example, regulations designed to prevent fraud by door-to-door salespeople, saying, "[e]ven if the interest in preventing fraud could adequately support the ordinance insofar as it applies to commercial transactions and the solicitation of funds, that interest provides no support for its application to petitioners, to political campaigns, or to enlisting support for unpopular causes."[91] Thus, the Court made clear that this kind of solicitation was different from other kinds of solicitation and was entitled to more protection.

Once again, while striking the statute, the Court mentioned but did not rely on the fact that registration imposed a special burden on those who believed that seeking a permit would itself be a violation of their religious beliefs.[92] Rather, the Court focused on the breadth of the ordi-

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82. *Id.* at 153.

83. *Id.*

84. *Id.*

85. *Id.* at 164-65 ("The Village argues that three interests are served by its ordinance: the prevention of fraud, the prevention of crime, and the protection of residents' privacy.").

86. *See id.* at 165 ("We have no difficulty concluding, in light of our precedent, that these are important interests that the Village may seek to safeguard through some form of regulation of solicitation activity.").

87. *Id.* at 160.

88. *Id.*

89. *Cf. supra* notes 44-51 and accompanying text (discussing the *Murdock* Court's refusal to base its decision on whether funds were being solicited).

90. *Stratton*, 536 U.S. at 161.

91. *Id.* at 168.

92. *See id.* at 167 ("requiring a permit as a prior condition on the exercise of the right to speak imposes an objective burden on some speech of citizens holding religious or patriotic views"); *see also* Kathryn Lusty, *Proselytizers, Pamphleteers, Pests, and Other First Amendment Champions:* Watchtower Bible and Tract Society of New York, Inc. v. Vill. of Stratton, 18 BYU J. PUB. L. 229, 233 (2003) ("[T]he idea of applying for the imprimatur of Stratton's municipal bureaucracy repulsed and offended the Witnesses, who instead sought a federal court injunction.").

nance, noting that the "mere fact that the ordinance covers so much speech raises constitutional concerns."[93]

The Court accepted that the prevention of crime was a legitimate state interest but was unconvinced that the ordinance was well-tailored to achieve that interest, noting that "it seems unlikely that the absence of a permit would preclude criminals from knocking on doors and engaging in conversations not covered by the ordinance."[94] The Court further noted "an absence of any evidence of a special crime problem related to door-to-door solicitation in the record."[95] Indeed, Justice Breyer noted in his *Stratton* concurrence that the Court has "never accepted mere conjecture as adequate to carry a First Amendment burden."[96]

An examination of the *Lovell-Stratton* line of cases might seem to reveal a consistent approach with respect to religious proselytizing. Yet, this apparent consistency is deceptive if only because the cases are so similar. One cannot tell, for example, whether the Court has endorsed a robust right to proselytize in a variety of contexts or, instead, has simply recognized a relatively limited right, for example, involving door-to-door solicitation. In the long period between *Martin* and *Stratton*,[97] the Court decided a few major cases that involved religious proselytizing but did not involve door-to-door solicitation and also did not involve Jehovah's Witnesses. Regrettably, the Court obscured rather than clarified the relevant jurisprudence when handing down those opinions.

II. TIME, PLACE, MANNER REGULATIONS

A discussion of the constitutional protections afforded to proselytizing should also include a case decided in the 1980s and two companion cases decided in the 1990s. These cases, all involving ISKCON, cloud the jurisprudence considerably, if only because the Court does so much to undercut the constitutional protections allegedly afforded to proselytizing. It is simply unclear what implications these cases have for proselytizing jurisprudence more generally, because they involve several variables not in the other cases. Nonetheless, some interpretations of these cases and the jurisprudence more generally must be rejected and others accepted with qualification because those interpretations only capture some of the conflicting elements in the case law. Basically, when one considers the ISKCON cases, the proselytizing jurisprudence seems

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Justice Scalia in his concurrence suggested that such a burden would not itself justify an exemption from the statute, writing, "[i]f a licensing requirement is otherwise lawful, it is in my view not invalidated by the fact that some people will choose, for religious reasons, to forgo speech rather than observe it." *Stratton*, 536 U.S. at 171 (Scalia, J., concurring).

93. *Stratton*, 536 U.S. at 165.

94. *Id.* at 169.

95. *Id.*

96. *Id.* at 170 (Breyer, J., concurring) (quoting Nixon v. Shrink Miss. Gov't. PAC, 528 U.S. 377, 392 (2000)).

97. *Martin* was decided in 1943 and *Stratton* was decided in 2002.

much less clear and the protections afforded to private proselytizing much less robust.

A. Restricting Where Solicitation Can Occur

Many of the religious solicitation regulations struck down by the Court involved attempts to regulate solicitation through licensing or fee requirements.[98] The Court worried that such regulations, if upheld, had the potential to cripple solicitation attempts by religious groups,[99] thereby both limiting speech and impairing the financial health of the religious organization. When similar concerns were implicated in *Heffron v. International Society for Krishna Consciousness, Inc.*,[100] the Court suddenly and inexplicably seemed to downgrade the importance of religious organizations being able to maintain financial health or even distribute written literature, while maintaining the importance of such organizations being able to engage in oral expression.

In *Heffron*, the Court considered whether the Constitution permits a state to require religious groups soliciting donations at a state fair to do so only within a booth, even if such a requirement would impose a limitation on the group's religious practices.[101] The challenged rule did not prevent the group's members from having "face-to-face discussions"[102] anywhere in the fair; its focus instead was on where the group's members could seek donations or hand out written literature.[103]

The Court noted both that ISKCON wanted to proselytize at the Minnesota State Fair because it believed that it could do so successfully,[104] and that the group believed that it could only be successful if it could stop people and solicit donations as those people walked about the Fair.[105] The Court reiterated the established understanding both that the oral and written dissemination of ISKCON's religious views are protected speech,[106] and that the fact that the materials are sold rather than handed out for free does not somehow waive or destroy those rights.[107]

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98. *See supra* notes 7-96 and accompanying text (discussing many of the licensing and permit cases in which solicitation was regulated).

99. *See supra* notes 63-65 and accompanying text (discussing the fear that regulation might make it impossible for religious groups to spread their message).

100. 452 U.S. 640 (1981).

101. *Id.* at 642.

102. *Id.* at 643-44.

103. *Id.* at 644.

104. *Id.* at 653.

105. *Id.* ("In its view, this can be done only by intercepting fair patrons as they move about, and if success is achieved, stopping them momentarily or for longer periods as money is given or exchanged for literature.").

106. *Id.* at 647 ("The State does not dispute that the oral and written dissemination of the Krishnas' religious views and doctrines is protected by the First Amendment." (citing Schneider v. New Jersey, 308 U.S. 147, 160 (1939) and Lovell v. City of Griffin, 303 U.S. 444, 452 (1938))).

107. *Id.* ("Nor does [the State] claim that this protection is lost because the written materials sought to be distributed are sold rather than given away or because contributions or gifts are solicited in the course of propagating the faith.").

Given that the dissemination of religious views was protected and that seeking donations did not somehow waive those protections, it seemed that the *Heffron* Court's analysis would follow the kinds of analyses offered in *Lovell*, *Cantwell*, *Murdock* and *Martin*.[108] However, the *Heffron* Court explained, "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired."[109] Rather, First Amendment freedoms are subject to "reasonable time, place, [and] manner restrictions,"[110] and the Court suggested that the relevant legal question was whether the rule at issue was a "permissible restriction on the place and manner of communicating the views of the Krishna religion."[111]

When offering its constitutional analysis, the *Heffron* Court explained that the rule at issue did not suffer from some of the obvious defects that the Court had seen in other proselytizing cases. For example, the Court noted that "[s]pace in the fairgrounds is rented to all comers in a nondiscriminatory fashion on a first-come, first-served basis,"[112] and that the rental rates were not intended to discourage speech, since the "charge [was] based on the size and location of the booth."[113] Indeed, to illustrate how evenhanded the system was, the Court pointed out that the rule "applies alike to nonprofit, charitable, and commercial enterprises,"[114] noting with approval that the rule at issue was "not open to the kind of arbitrary application that this Court has condemned as inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view."[115] Yet, the fact that the challenged rule did not contain these defects did not establish that the rule was free from all defects, especially considering that application of the rule to ISKCON might make it extremely difficult for that group to raise money.[116]

When the *Murdock* Court examined a tax on itinerant preachers, it noted that imposing a tax on "the privilege of engaging in this form of missionary evangelism can close its doors to all those who do not have a full purse. Spreading religious beliefs in this ancient and honorable manner would thus be denied the needy."[117] While *Heffron* did not in-

108. Indeed, *Lovell*, *Murdock*, and *Cantwell* are all cited in the opinion. *Id.*
109. *Id.*
110. *Id.* (citing Grayned v. City of Rockford, 408 U.S. 104 (1972)).
111. *Id.* at 648.
112. *Id.* at 644.
113. *Id.*
114. *Id.*
115. *Id.* at 649.
116. *See infra* notes 133-34 and accompanying text.
117. Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943); *see also* Follett v. Town of McCormick, 321 U.S. 573, 579 (Murphy, J., concurring) ("It is wise to remember that the taxing and licensing power is a dangerous and potent weapon which, in the hands of unscrupulous or bigoted men, could be used to suppress freedoms and destroy religion unless it is kept within appropriate bounds.").

volve a tax, it nonetheless involved monies that would have to be paid if ISKCON was to distribute written materials or solicit donations.[118] Further, monies were at issue in a different sense as well, because the ordinance was limiting the effectiveness of the solicitations. Thus, even had the state not been renting the booths but instead had merely required that all solicitation be performed in booths,[119] the suit presumably still would have been brought, precisely because ISKCON would suffer opportunity costs by being required to do all solicitation from within a booth.

The *Heffron* Court placed some emphasis on the "nondiscriminatory fashion" in which the booths were rented[120] and that the rental rates were tied to the size and location of the booth.[121] Yet, one infers, these very same factors would not have won the day in *Murdock*. For example, the *Murdock* Court rejected the contention that the ordinance at issue should be upheld because it was not in fact particularly onerous to pay,[122] and the fact that the ordinance was "nondiscriminatory"[123] did not render it immune from further constitutional review. Indeed, the *Murdock* Court criticized the tax, notwithstanding its facial neutrality,[124] because it was "fixed in amount and unrelated to the scope of the activities of petitioners or to their realized revenues."[125] Yet, the same point might have been made about the system in place at the Minnesota State Fair, since the flat rates were tied to the size of the booths rather than realized gains.

The *Heffron* Court criticized the Minnesota Supreme Court for only considering the burdens on the state that would have been imposed by creating an exception for ISKCON.[126] At least one of the important issues to resolve involved the proper focus of analysis, for example, whether the Minnesota Supreme Court instead should have considered how much of a burden would have been imposed on the state had those religious groups who made "peripatetic solicitation as part of a church

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118. While oral advocacy was permitted anywhere in the Fair, even the distribution of written material for free had to occur from within a booth. *See Heffron*, 452 U.S. at 644.

119. The *Heffron* Court noted that the rental rates were not being contested. *Id.* at 644 n.4 ("The propriety of the fee is not an issue in the present case.").

120. *Id.* at 644.

121. *Id.*

122. *Murdock*, 319 U.S. at 112-13 (rejecting the contention that "the fact that the license tax can suppress or control this activity is unimportant if it does not do so"); *see also id.* at 118 (Reed, J., dissenting) ("This dissent does not deal with an objection which theoretically could be made in each case, to wit, that the licenses are so excessive in amount as to be prohibitory. This matter is not considered because that defense is not relied upon in the pleadings, the briefs or at the bar.").

123. *Id.* at 115 ("The fact that the ordinance is 'nondiscriminatory' is immaterial. The protection afforded by the First Amendment is not so restricted.").

124. *See id.* at 106 ("'For one day $1.50, for one week seven dollars ($7.00), for two weeks twelve dollars ($12.00), for three weeks twenty dollars ($20.00)'. . . .").

125. *Id.* at 113.

126. *Heffron*, 452 U.S. at 652 ("As we see it, the Minnesota Supreme Court took too narrow a view of the State's interest in avoiding congestion and maintaining the orderly movement of fair patrons on the fairgrounds. The justification for the Rule should not be measured by the disorder that would result from granting an exemption solely to ISKCON.").

ritual"[127] been relieved of the burden of solely soliciting funds from booths[128] or, perhaps, had religious groups as a general matter been relieved of that burden. Had the Minnesota Supreme Court not solely focused on the burden created by exempting ISKCON but instead focused on the burden which would be imposed on the state by exempting religious groups in general from the in-booth requirement, it would only have been following the example set by the *Murdock* Court when it had restricted its analysis to "a single issue—the constitutionality of an ordinance which as construed and applied requires religious colporteurs to pay a license tax as a condition to the pursuit of their activities."[129]

To ask how much of a burden would have been imposed on the state by exempting religious groups generally is not to answer it. It is simply unclear, for example, how much of a burden would have been imposed on the state by exempting those religious groups who had ritualized solicitation or, perhaps, by exempting religious groups more generally from the requirement. Religious groups were already permitted to walk the grounds to engage in oral advocacy, so if a religious group exemption had been recognized it is at best unclear which groups would then have taken the opportunity to solicit throughout the fair or whether the traffic flow would have been greatly affected.[130] Neither the Minnesota Supreme Court nor the United States Supreme Court speculated about who might decide to take advantage of any recognized proselytizing exemption, although the United States Supreme Court did note some of the religious groups who already had a presence at the State Fair.[131] In any event, the Minnesota Supreme Court had already found that the state would not have been severely burdened by affording the Krishnas an exemption,[132] and it would seem at best speculative to claim that a somewhat broader exemption would create severe traffic difficulties.

The *Murdock* Court suggested that the "power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this Court has repeatedly struck down,"[133] a point

127. *See id.*

128. *Cf.* Brian Freeman, *Expiating the Sins of* Yoder *and* Smith: *Toward a Unified Theory of First Amendment Exemptions from Neutral Laws of General Applicability*, 66 MO. L. REV. 9, 64 (2001) ("No other religions are known to require its members, as a religious ritual, to distribute and sell religious literature and to solicit donations.").

129. *Murdock*, 319 U.S. at 110.

130. *E.g.*, Ronald Baxt Turovsky, Heffron v. International Society for Krishna Consciousness, Inc.: *Confusing Free Speech with Free Exercise Rights*, 71 CAL. L. REV. 1012, 1027 (1983) ("Considering the small number of groups that could have made the religious claim, and the fact that all persons or groups could make speeches, argue, and proselytize within the fairground, the additional congestion caused by . . . [granting the exemption] would not have been so overwhelming as to render the system unworkable.").

131. *See Heffron*, 452 U.S. at 644 n.5 (mentioning the Church of Christ and the Twin Cities Baptist Messianic Witness among others).

132. *Id.* at 652 ("the court concluded that although some disruption would occur from such an exemption, it was not of sufficient concern to warrant confining the Krishnas to a booth.").

133. *Murdock*, 319 U.S. at 113.

which analogously applies to the Minnesota regulation. If requiring the Krishnas to solicit from their booths would preclude them from soliciting effectively,[134] that would make the booth requirement as potent as the power of censorship. Basically, by restricting ISKCON to soliciting from within a booth, the Court may have upheld a policy which in effect prevented solicitation by that group entirely.

Murdock is instructive in yet another respect. Just as one of the fears articulated in *Murdock* was that itinerant preachers would be taxed in several localities, making it even more difficult for them to proselytize, an analogous fear would be that many other event organizers would similarly limit where solicitation could take place.[135] Were that to occur, solicitation by ISKCON might effectively be precluded in a whole host of venues.

The state's asserted interest in having the rule was "the need to maintain the orderly movement of the crowd given the large number of exhibitors and persons attending the Fair."[136] The Court believed that the proper way to analyze the issue was not only to consider the added disruption which might be caused were an exception made for the Krishnas,[137] but to consider how much potential disorder might be caused were the state required to permit many more groups to solicit freely.[138] After all, the Court reasoned, religious organizations do not

> enjoy rights to communicate, distribute, and solicit on the fairgrounds superior to those of other organizations having social, political, or other ideological messages to proselytize. These nonreligious organizations seeking support for their activities are entitled to rights equal to those of religious groups to enter a public forum and spread their views, whether by soliciting funds or by distributing literature.[139]

Indeed, when offering its analysis, the Court did not limit its focus to political, religious, or charitable organizations, noting that the "question would also inevitably arise as to what extent the First Amendment also gives commercial organizations a right to move among the crowd to dis-

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134. *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Barber, 506 F. Supp. 147, 156 (N.D.N.Y. 1980) ("The Krishnas state flatly that they cannot practice Sankirtan from the confines of a fair booth. They base this conclusion on both religious dogma and considerations of practicality.").

135. *See, e.g., id.* at 153 (noting that Krishnas also solicit at airports, bus terminals, expressway rest stops, shopping centers, parks national monuments, naval bases, conventions centers, football games and horse and auto race tracks among other places).

136. *Heffron*, 452 U.S. at 649-50.

137. *Id.* at 652 ("As we see it, the Minnesota Supreme Court took too narrow a view of the State's interest in avoiding congestion and maintaining the orderly movement of fair patrons on the fairgrounds. The justification for the Rule should not be measured by the disorder that would result from granting an exemption solely to ISKCON.").

138. *Id.* at 653 ("Obviously, there would be a much larger threat to the State's interest in crowd control if all other religious, nonreligious, and noncommercial organizations could likewise move freely about the fairgrounds distributing and selling literature and soliciting funds at will.").

139. *Id.* at 652-53.

tribute information or to sell their wares as respondents claim they may do."[140]

If all of these groups had to be accorded the same rights, then the burden imposed on the state by making an exception for ISKCON had the potential to be quite great. The Court reasoned that an exemption for ISKCON could not "be meaningfully limited to ISKCON, and as applied to similarly situated groups would prevent the State from furthering its important concern with managing the flow of the crowd."[141] Yet, it was not at all clear that the Court was correct when claiming that no meaningful limitations could be offered. The Court wrote:

> None of our cases suggest that the inclusion of peripatetic solicitation as part of a church ritual entitles church members to solicitation rights in a public forum superior to those of members of other religious groups that raise money but do not purport to ritualize the process. Nor for present purposes do religious organizations enjoy rights to communicate, distribute, and solicit on the fairgrounds superior to those of other organizations having social, political, or other ideological messages to proselytize. These nonreligious organizations seeking support for their activities are entitled to rights equal to those of religious groups to enter a public forum and spread their views, whether by soliciting funds or by distributing literature.[142]

Yet, this is false. The Court has indeed suggested that solicitation that is part of a ritual is entitled to special protection, having likened it to other protected religious practices. Indeed, the *Murdock* Court suggested that "the hand distribution of religious tracts is . . . [a] form of religious activity [which] occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits,"[143] expressly contrasting religious sales with mere commercial sales and suggesting that the latter could more readily be limited or prohibited than the former.[144] Further, as Justice Brennan noted in his concurring and dissenting opinion in *Heffron*, "governmental regulations which interfere with the exercise of specific religious beliefs or principles should be scrutinized with particular care."[145]

At least a few points might be made about the *Heffron* Court's analysis. Nowhere in the series of cases in which the Court examined limitations on the rights of Jehovah's Witnesses to solicit funds did the

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140. *Id.* at 653.
141. *Id.* at 654.
142. *Id.* at 652-53.
143. Murdock v. Pennsylvania, 319 U.S. 105, 108-09 (1943).
144. *See supra* notes 45-47 and accompanying text.
145. *Heffron*, 452 U.S. at 660 n.3 (Brennan, J., concurring in part and dissenting in part); *see also* Turovsky, *supra* note 130, at 1023-24 ("The Court erred in equating ISKCON's free exercise claim with the speech rights of secular groups at the fair. The free speech and free exercise tests are different. A religious claimant such as ISKCON has greater protection under the free exercise clause than under the free speech clause.").

Court suggest that the state was prohibited from imposing limitations on merely commercial activities, so the Court's invoking the specter of various commercial vendors hawking their wares throughout the State Fair was simply an exercise in misdirection. Further, there are obvious differences between commercial vendors, who might well be quite successful even when vending from a booth, and others wishing to receive monies, who might well find their success dependent upon not being geographically restricted.[146] Indeed, different religious groups might have varying degrees of success when attempting to distribute literature or raise monies from booths.[147]

The *Heffron* Court noted in passing that ISKCON members were permitted to walk the grounds discussing their religious views. This means that the State was willing to permit ISKCON members to engage in possibly long religious discussions thereby impeding traffic flow, as long as they did not at the same time solicit funds. Yet, solicitation of funds might involve *less* of an obstruction to traffic flow than would oral advocacy. Solicitation might involve one or a few people stopping momentarily to give money, while oral advocacy would be more likely to attract a crowd, especially if one or more individuals of differing views wished to engage in a debate.

One of the most confusing elements of *Heffron* was why the Court chose to offer the analysis that it did. Apparently, ISKCON had not argued that it was entitled to special consideration because its solicitation was part of a religious ritual.[148] The Court might simply have chosen not to address whether ritualized solicitation practices pose special constitutional concern, and might instead have addressed the matter as applied to any group challenging the rule. In that way, the Court simply would not have offered any comments about the kinds of exceptions that should be made so that free exercise guarantees would not be violated.[149]

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146. Int'l Soc'y for Krishna Consciousness, Inc. v. Barber, 506 F. Supp. 147, 156 (N.D.N.Y. 1980) ("The Krishnas further maintain that, from a practical point of view, the fair goers are unlikely on their own to go out of their way to find a Krishna booth at the State Fair. This being the case, the Krishnas would be denied or restricted in their opportunity to spread the 'truth,' solicit contributions, and gain converts.").

147. *See* Kathleen M. Sullivan, *Discrimination, Distribution and Free Speech*, 37 ARIZ. L. REV. 439, 447 (1995) ("The unpopular must go to the mountain, we said, for the mountain will not come to them. Minnesotans will flock to the booths of the Methodists, Presbyterians or Episcopalians, but if Hare Krishna devotees sit in their booth waiting for listener-initiated contact, they will have a long and very quiet day.").

148. *See Heffron*, 452 U.S. at 660 n.3 (Brennan, J., concurring in part and dissenting in part) ("In their brief and in oral argument, however, respondents emphasize that they do not claim any special treatment because of Sankirtan, but are willing to rest their challenge wholly upon their general right to free speech, which they concede is identical to the right enjoyed by every other religious, political, or charitable group.").

149. *See id.* at 660 n.3 (Brennan, J., concurring in part and dissenting in part) ("Having chosen to discuss it, however, the Court does so in a manner that is seemingly inconsistent with prior case law.").

In the Jehovah's Witnesses cases, the Court viewed the breadth of the ordinance as itself raising constitutional concerns.[150] In contrast, the *Heffron* Court implied that the regulation's breadth was the reason to uphold the regulation, claiming that the inability to make distinctions and thus limit the exemption would make crowd control very difficult. Yet, the Court's claimed inability to make distinctions was belied by its own analyses in other cases, even if one brackets the religion factor.

In *Village of Schaumberg v. Citizens for a Better Environment*,[151] the Court laid out some of the factors that must be considered when judging the constitutionality of state regulations of solicitation. There must be:

> due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease.[152]

Here, the *Schaumberg* Court is suggesting that one of the factors that must be considered in any analysis restricting solicitation is how much of a burden would thereby be placed on the group seeking funds. Both in *Schaumberg* and in the Jehovah's Witnesses line of cases, the Court is thus offering yet another way to distinguish among groups that might be affected by solicitation regulations, namely, whether imposing the limitation at issue would severely impair the ability to raise money or, perhaps, bring about the group's financial ruin. Given that the Court mentioned ISKCON's claim that its being confined to a booth would severely hamper its attempt to raise monies, one might have expected the Court to offer a more detailed analysis regarding why that consideration did not win the day. The Court offered no such analysis and did not even consider whether such a rule would in effect prohibit the Krishnas from soliciting at the State Fair, instead merely announcing that it was "unwilling to say that Rule 6.05 does not provide ISKCON and other organizations with an adequate means to sell and solicit on the fairgrounds."[153]

One issue mentioned in *Heffron* was given much too little discussion. The Court noted the state's claims that the rule "forwards the State's valid interest in protecting its citizens from fraudulent solicitations, deceptive or false speech, and undue annoyance,"[154] but then said that in "light of our holding that the Rule is justified solely in terms of

150. *See supra* note 93 and accompanying text.
151. Vill. of Schaumberg v. Citizens for a Better Env't, 444 U.S. 620 (1980).
152. *Id.* at 632.
153. *Heffron*, 452 U.S. at 655.
154. *Id.* at 650 n.13 (citing *Schaumburg*, 444 U.S. 620).

the State's interest in managing the flow of the crowd, we do not reach whether . . . [this other purpose is] constitutionally sufficient to support the imposition of the Rule."[155] Justice Brennan in his concurrence and dissent took a different tack, suggesting that the record supported the state's claim that it needed the rule to prevent fraud, although he did not specifically discuss what in the record led him to that conclusion.[156]

While the Court expressly declined to decide whether prevention of fraud would suffice to justify the ordinance,[157] it seems safe to assume that the Justices were considering the fraud aspect of the case, given the majority's *express* refusal to decide whether that would suffice as a justification and Justice Brennan's reliance on that factor. Further, Justice Blackmun in his *Heffron* concurrence and dissent also indicated that he was considering the fraud factor. However, he expressly rejected the fraud rationale because there was:

> nothing in this record to suggest that it is more difficult to police fairgrounds for fraudulent solicitations than it is to police an entire community's streets; just as fraudulent solicitors may "melt into a crowd" at the fair, so also may door-to-door solicitors quickly move on after consummating several transactions in a particular neighborhood.[158]

Thus, Justices Brennan and Blackmun each suggested that fraudulent solicitation was a problem at the Fair, although they disagreed about whether other, more limited measures might be taken which would suffice to prevent that evil.

There might have been at least two unarticulated reasons that would help explain why the Court did not rely on the fraud rationale. First, ISKCON had mounted a facial challenge to the ordinance. Even were the Krishnas fraudulently inducing individuals to donate, that would not resolve the constitutionality of the ordinance—the Court still would have had to decide whether the regulation was substantially overbroad.[159] For example, if the regulation prevented a variety of other groups from non-fraudulently engaging in protected expression, then the regulation might be struck down even if the appellants could not themselves claim that the

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155. *Id.*

156. *Id.* at 657 (Brennan, J., concurring in part and dissenting in part) ("[B]ecause I believe on this record that this latter interest is substantially furthered by a Rule that restricts sales and solicitation activities to fixed booth locations, where the State will have the greatest opportunity to police and prevent possible deceptive practices, I would hold that Rule 6.05's restriction on those particular forms of First Amendment expression is justified as an antifraud measure.").

157. *See supra* notes 154-55 and accompanying text

158. *Heffron*, 452 U.S. at 664 (Blackmun, J., concurring in part and dissenting in part).

159. *See* Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) ("[P]articularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.").

regulation was preventing them from engaging in protected expression.[160]

Second, it was not at all clear that the record revealed fraudulent activity by the Krishnas at the Minnesota State Fair. Indeed, the Minnesota Supreme Court implied that the record did not contain the damning evidence that one might have inferred was there, suggesting instead that claims about fraudulent behavior had been made elsewhere.[161]

By focusing on crowd control rather than fraud, the Court was able to avoid the difficulties inherent in claiming that the regulation was well-tailored to prevent fraud, given the absence of evidence of fraud at the Fair. However, the Court's claims about the need for crowd control seemed rather speculative, especially because the Court overestimated the difficulties in crafting an exemption which would have permitted some but not others to distribute literature and solicit donations outside of booths.[162] This makes the Court's justification rather tenuous—as later explained by Justice Breyer in his *Stratton* concurrence, speculation will not suffice to defeat a First Amendment claim.[163]

In his *Heffron* concurrence and dissent, Justice Blackmun accepted the Court's crowd control rationale at least with respect to solicitation, arguing that "common-sense differences between literature distribution, on the one hand, and solicitation and sales, on the other, suggest that the latter activities present greater crowd control problems than the former."[164] For example, Justice Blackmun noted that the "distribution of literature does not require that the recipient stop in order to receive the message the speaker wishes to convey; instead, the recipient is free to read the message at a later time."[165] Precisely because the reader might decide not to read the literature immediately, Justice Blackmun noted that "literature distribution may present even fewer crowd control problems than the oral proselytizing that the State already allows upon the fairgrounds."[166] In contrast, where money is changing hands, there is a greater likelihood that foot traffic will be slowed, because "sales and the collection of solicited funds not only require the fairgoer to stop, but also

160. *See* Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 633-34 (1980) ("We agree with the Court of Appeals that CBE was entitled to its judgment of facial invalidity if the ordinance purported to prohibit canvassing by a substantial category of charities to which the 75-percent limitation could not be applied consistently with the First and Fourteenth Amendments, even if there was no demonstration that CBE itself was one of these organizations.").

161. *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Heffron, 299 N.W.2d 79, 85 (Minn. 1980) ("*Although we are limited by the record in this case*, we recognize that an additional concern of defendants may involve the manner in which some members of ISKCON are reputed to practice Sankirtan." (emphasis added)).

162. *See supra* notes 126-53 and accompanying text.

163. *See supra* note 96 and accompanying text.

164. Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 665 (1981) (Blackmun, J., concurring in part and dissenting in part).

165. *Id.*

166. *Id.*

'engender additional confusion . . . because they involve acts of exchanging articles for money, fumbling for and dropping money, making change, etc.'" [167]

A few points might be made about Justice Blackmun's common-sense observation. First, it undercuts the constitutionality of the state's requirement that all literature be distributed from booths. Oral advocacy might be expected to cause more crowd control problems than would handing out free written materials, because those materials might be read at the recipient's leisure. If the worry really was that traffic control and oral advocacy would be more likely to disrupt traffic patterns than would the distribution of free literature, then one would expect the Court to strike down the restriction on the distribution of free literature outside of booths. Second, while Justice Blackmun's common-sense observation is accurate as far as it goes, he does not thereby settle the relevant constitutional question, which involves *how much* more difficult it would be to control crowds if solicitation were permitted, which itself depends upon how many groups would seek to solicit. Common sense would not be particularly helpful in determining whether the increased burden would be enough to justify the prohibition. Indeed, one might expect that intermediate scrutiny[168] would require a more persuasive analysis than just an appeal to common sense, especially where the relevant question is not merely whether traffic flow problems would be greater were an exemption recognized but whether the increase would be sufficiently onerous to justify the regulation at issue.

B. Solicitation and Literature Distribution at Airports

In *Heffron*, the Court upheld a regulation which limited sankirtan[169] to booths. At issue in *International Society for Krishna Consciousness, Inc. v. Lee*[170] was a ban on sankirtan in airport terminals—the challenged regulation prohibited "the repetitive solicitation of money or distribution of literature"[171] within the Newark International Airport, John F. Kennedy International Airport, and La Guardia Airport terminals.[172]

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167. *Id.* (citing Int'l Soc'y for Krishna Consciousness, Inc. v. Heffron, 299 N.W.2d 79, 87 (Minn. 1980)).

168. *See* Kevin Francis O'Neill, *Privatizing Public Forums to Eliminate Dissent*, 5 FIRST AMEND. L. REV. 201, 223 (2007) (discussing "the intermediate scrutiny normally reserved for content-neutral time, place, and manner restrictions").

169. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 674-75 (1992) ("[The] ritual known as *sankirtan* . . . consists of 'going into public places, disseminating religious literature and soliciting funds to support the religion.'" (citing Int'l Society for Krishna Consciousness, Inc. v. Lee, 925 F.2d 576, 577 (2d Cir. 1991))).

170. *Id.* at 672. Below, this opinion will be referred to as "*ISKON*." The companion case, *Lee v. International Society for Krishna Consciousness, Inc.*, 505 U.S. 830 (1992) will be referred to as "*Lee*."

171. *ISKON*, 505 U.S. at 675.

172. *See id.*

In upholding the ban on sankirtan in these terminals, the *ISKCON* Court explained both that individuals wishing to avoid the Krishnas' solicitation "may have to alter their paths, slowing both themselves and those around them,"[173] and that "[d]elays may be particularly costly in this setting, as a flight missed by only a few minutes can result in hours worth of subsequent inconvenience."[174] The Court further noted that "face-to-face solicitation presents risks of duress that are an appropriate target of regulation. The skillful, and unprincipled, solicitor can target the most vulnerable, including those accompanying children or those suffering physical impairment and who cannot easily avoid the solicitation."[175]

Perhaps as a way of establishing that the Port Authority was providing a reasonable alternative whereby ISKCON would still be able to communicate its message, the Court noted that the Post Authority permitted solicitation and distribution of materials "in the sidewalk areas outside the terminals,"[176] an "area . . . frequented by an overwhelming percentage of airport users."[177] Indeed, Justice Kennedy in his concurrence suggested that the regulation passed muster precisely because there were "ample alternative channels for communication."[178]

Yet, the Port Authority's willingness to permit sankirtan in the sidewalk areas around the terminals cuts both ways. Worries justifying regulation within the terminal would also justify regulation outside of the terminal—individuals hurrying to a plane might be delayed whether within or immediately outside the terminal, and people rushing to a plane who are stopped to receive literature or make a donation might feel coerced or under duress whether within or outside the terminal.[179] If the Port Authority did not feel these concerns justified preventing distribution and solicitation outside the terminal,[180] it is not clear why they would justify preventing solicitation within the terminal.

Many of the justifications cited by the Court for upholding a ban on sankirtan within the terminal would also seem to justify a ban on the

173. *Id.* at 683.
174. *Id.* at 684.
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.* at 707 (Kennedy, J., concurring).
179. *Cf.* ISKCON Miami, Inc. v. Metro. Dade County, Florida, 147 F.3d 1282, 1287 (11th Cir. 1998) (upholding bans on solicitation and sales of materials on sidewalks adjacent to Miami International Airport for same reasons that such bans were permissible inside the airport).
180. It might be argued that the sidewalks outside the terminal were public fora and thus the test for prohibiting speech there was much more onerous for the government to meet. However, just as the Court used *United States v. Kokinda*, 497 U.S. 720 (1990) to justify its employing a more deferential test to determine whether the government's prohibition within the terminal passed constitutional muster, *see ISKCON*, 505 U.S. at 678, the Court might also have cited *Kokinda* for the proposition that the sidewalks next to the airport were not public fora. After all, *Kokinda* held that the sidewalks leading to a post office were not public fora. *See Kokinda*, 497 U.S. at 730 (holding that the sidewalk leading to the post office was not a public forum).

distribution of literature within the terminal.[181] Yet, in *Lee v. International Society for Krishna Consciousness, Inc.*,[182] the Court struck down the limitations on the distribution of literature within the terminals in a per curiam opinion.[183]

One of the interesting aspects of the *Lee* opinion was the Court's justification for its position. Rather than articulate a rationale, the Court simply said that for the "reasons expressed in the [*ISKCON*] opinions of Justice O'Connor, Justice Kennedy and Justice Souter, . . . the judgment of the Court of Appeals holding that the ban on distribution of literature in the Port Authority airport terminals is invalid under the First Amendment is Affirmed."[184]

The Court's citing to rather than repeating the different *ISKCON* opinions would not be worthy of comment were all of those opinions basically making the same points. However, there were profound disagreements among these opinions about, for example, whether an airport should be considered a public forum,[185] which test should be used to determine the constitutionality of the policies at issue,[186] and which practices, if any, could be prohibited without offending the relevant test.[187] By referring to those opinions without explaining which aspects of those opinions persuaded the *Lee* majority, the Court was able to avoid the

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181. *See Lee*, 505 U.S 830, 831 (1992) (Rehnquist, C.J., dissenting) ("[T]he risks and burdens posed by leafleting are quite similar to those posed by solicitation.").

182. *Id.* at 830.

183. *See id.* at 831 (affirming the local court holding that the ban on the distribution of literature in the terminals was unconstitutional).

184. *Id.*

185. *Compare ISKCON*, 505 U.S. at 686 (O'Connor, J., concurring) ("I . . . agree that publicly owned airports are not public fora.") *with id.* at 693 (Kennedy, J. concurring in the judgment) ("In my view the airport corridors and shopping areas outside of the passenger security zones, areas operated by the Port Authority, are public forums, and speech in those places is entitled to protection against all government regulation inconsistent with public forum principles.") *and id.* at 709-10 (Souter, J., with whom Justice Blackmun and Justice Stevens join, dissenting) ("I agree with Justice Kennedy's view of the rule that should determine what is a public forum and with his conclusion that the public areas of the airports at issue here qualify as such.").

186. *Compare id.* at 688 (O'Connor, J., concurring) ("We have said that a restriction on speech in a nonpublic forum is 'reasonable' when it is 'consistent with the [government's] legitimate interest in 'preserv[ing] the property . . . for the use to which it is lawfully dedicated.'" (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 50-51 (1983))) *with id.* at 703 (Kennedy, J. concurring) ("The regulation is in fact so broad and restrictive of speech, Justice O'Connor finds its void even under the standards applicable to government regulations in nonpublic forums . . . . I have no difficulty deciding the regulation cannot survive the far more stringent rules applicable to regulations in public forums. The regulation is not drawn in narrow terms, and it does not leave open ample alternative channels for communication." (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989))).

187. *Compare id.* at 703 (Kennedy, J. concurring in the judgment) ("[T]he Port Authority's ban on the 'solicitation and receipt of funds' within its airport terminals . . . may be upheld as either a reasonable time, place, manner restriction, or as a regulation directed at the nonspeech elements of expressive conduct.") *with id.* at 712 (Souter, J., with whom Justice Blackmun and Justice Stevens join, dissenting) ("Even if I assume, *arguendo*, that the ban on the petitioners' activity at issue here is both content neutral and merely a restriction on the manner of communication, the regulation must be struck down for its failure to satisfy the requirements of narrow tailoring to further a significant state interest." (citing Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984))).

difficult but possibly helpful task of explaining why the policy at issue was unconstitutional.

Basically, the *ISKCON* majority upheld the ban on solicitation,[188] and the *Lee* majority struck down the ban on the distribution of literature.[189] Certainly, the two opinions are compatible if, for example, the distribution of literature is viewed as paradigmatic speech and solicitation is viewed as akin to commercial activity and thus more readily subject to regulation. Yet, that way of differentiating between solicitation and literature distribution runs counter to the existing jurisprudence.[190] If, indeed, solicitation of money in support of religion "occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits,"[191] it might be surprising that the prohibition on the distribution of religious materials would be struck down but that the ban on solicitation would be upheld. Arguably, the distribution of religious literature is also analogous to preaching, and thus the Court would seem to be protecting one kind of preaching and not protecting another. Even more surprising are the justifications offered by some members of the Court regarding why the solicitation and literature distribution bans are so different for constitutional purposes that one but not the other could be upheld.

One of the important issues about which the Justices could not agree in *ISKCON* was whether the airport should be considered a public forum. Chief Justice Rehnquist and Justices White, Scalia, Thomas and O'Connor rejected that the airport was a public forum[192] and suggested that the regulation should be upheld as long as it was reasonable.[193] Justices Kennedy, Blackmun, Stevens and Souter all suggested that the airport was a public forum,[194] and thus that the "regulation must be drawn in narrow terms to accomplish its end and leave open ample alternative channels for communication."[195]

As one might expect, the *ISKCON* majority upheld the constitutionality of the solicitation ban in light of the deferential reasonableness

188. *See id.* at 685.

189. *See Lee*, 505 U.S. 830, 831 (1992) ("[T]he judgment of the Court of Appeals holding that the ban on distribution of literature in the Port Authority Airport is invalid under the First Amendment is affirmed.").

190. *See supra* notes 45-47 (discussing the rejection of the equivalence between solicitation for religious causes and solicitation for commercial causes).

191. Murdock v. Pennsylvania, 319 U.S. 105, 109 (1943).

192. *See ISKCON*, 505 U.S. at 679; *see also id.* at 686 (O'Connor, J., concurring) (agreeing that "publicly owned airports are not public fora").

193. *See id.* at 683 (O'Connor, J., concurring) ("The restrictions here challenged, therefore, need only satisfy a requirement of reasonableness.").

194. *See id.* at 693 (Kennedy, J., concurring) ("The airport corridors and shopping areas outside of the passenger security zones, areas operated by the Port Authority, are public forums, and speech in those places is entitled to protection against all government regulation inconsistent with public forum principles.").

195. *Id.* at 707.

test.[196] However, those rejecting that mere reasonableness would suffice disagreed about whether the Port Authority regulation passed the more rigorous intermediate scrutiny test. Justices Souter, Blackmun and Stevens all argued that the state's regulation had to be "struck down for its failure to satisfy the requirements of narrow tailoring to further a significant state interest,"[197] whereas Justice Kennedy suggested that the "Port Authority's ban on the 'solicitation and receipt of funds' within its airport terminals should be upheld under the standards applicable to speech regulations in public forums."[198] While the mere fact of disagreement with respect to whether a test has been met is not so unusual,[199] there are several considerations that make the opinion of Justice Kennedy and the opinion of Justice Souter, onto which both Justices Blackmun and Stevens signed, worth a closer look.

One element to consider when analyzing the *ISKCON* and *Lee* opinions is that three of the Justices were also on the *Heffron* Court—Chief Justice Rehnquist, and Justices Stevens and Blackmun. Chief Justice Rehnquist's opinions in *Lee* and *ISKCON* were compatible with his view in *Heffron* in that in each he suggested that the state regulation passed constitutional muster. However, one could not have predicted the positions of Justices Stevens and Blackmun in *Lee* and *ISKCON* based on their positions in *Heffron*.

Justice Stevens had signed onto Justice Brennan's *Heffron* concurrence and dissent,[200] which suggested that the state's interest in the prevention of fraud justified the restriction at the Minnesota State Fair. Yet, one might have expected that the fraud rationale would also win the day in *ISKCON*, since that was also cited as a concern. For example, the *ISKCON* majority noted that the "unsavory solicitor can . . . commit fraud through deliberate concealment of his affiliation or through deliberate efforts to shortchange those who agree to purchase,"[201] although the fraud cited occurred in a different case. [202] Justice O'Connor also alluded to fraud in her concurrence—"[t]he record in this case confirms that the problems of congestion and fraud that we have identified with solicita-

196. *But see infra* notes 209-18 and accompanying text (discussing Justice O'Connor's rejection of the reasonableness of the ban on the distribution of literature).

197. *ISKCON*, 505 U.S. at 712 (Souter, J., dissenting).

198. *Id.* at 703 (Kennedy, J., concurring).

199. *Compare, e.g.*, McCreary County v. ACLU, 545 U.S. 844, 860, 870 (2005) (Ten Commandments display violates *Lemon*'s purpose prong) *with id.* at 902-03 (Scalia, J., dissenting) (display meets *Lemon* test).

200. *See* Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 656 (1981) (Brennan, J., concurring in part and dissenting in part).

201. *See ISKCON*, 505 U.S. at 684 (citing Int'l Soc'y for Krishna Consciousness, Inc. v. Barber, 506 F. Supp. 147, 159-63 (N.D.N.Y. 1980)).

202. *See id.* (citing *Barber*, 506 F. Supp. at 159-63).

tion in other contexts have also proved true in the airports' experiences."[203]

As had been true in *Heffron*, there was some question whether there was significant evidence of fraud in *ISKCON*. Thus, Justice Souter noted in his dissent that the "evidence of fraudulent conduct here is virtually nonexistent. It consists of one affidavit describing eight complaints, none of them substantiated, 'involving some form of fraud, deception, or larceny' over an entire 11-year period between 1975 and 1986."[204] Yet, if the evidence of fraud in cases *not before the Court* was nonetheless enough to justify the restriction in *Heffron*,[205] one might have expected similar evidence plus some complaints to justify the policy at issue in *ISKCON*, although it may be that Justice Stevens changed his mind about whether a restriction on solicitation was permissible primarily based on allegations of fraud occurring in another case. Indeed, one infers that the *ISKCON* majority was somewhat defensive about its assertions regarding fraud, since it felt compelled to offer a conjecture about why there were *not* many complaints alleging fraud.[206]

Justice Blackmun rejected his own *Heffron* common-sense analysis in *ISKCON*, although the *ISKCON* majority as well as Justice O'Connor in concurrence cited that reasoning to support their position.[207] While one would infer from the Minnesota Supreme Court's opinion that there was no smoking gun in *Heffron*,[208] it may be that both Justices Stevens and Blackmun saw something in the *Heffron* record that was not present in the *ISKCON* record.

What was most surprising were the positions offered by Justices O'Connor and Kennedy justifying their concurrences in both *ISKCON* and *Lee*. For example, Justice O'Connor agreed that the literature distribution ban was unconstitutional, notwithstanding her agreement that the relevant test was whether the restriction was "reasonable."[209] To justify her position, she explained that while the airport was not a public forum,[210] it nonetheless should not simply be understood as having "a single purpose—facilitating air travel."[211] Instead, she suggested that the "airports house restaurants, cafeterias, snack bars, coffee shops, cocktail

203. *Id.* at 690 (O'Connor, J., concurring) (citing app. 67-111 (affidavits)).

204. *Id.* at 713-14 (Souter, J., dissenting).

205. *See supra* note 161 and accompanying text (pointing out that the Minnesota Supreme Court had implied that there was little if any evidence of fraud at the Minnesota State Fair).

206. *ISKCON*, 505 U.S. at 684 ("Compounding this problem is the fact that, in an airport, the targets of such activity frequently are on tight schedules. This in turn makes such visitors unlikely to stop and formally complain to airport authorities. As a result, the airport faces considerable difficulty in achieving its legitimate interest in monitoring solicitation activity to assure that travelers are not interfered with unduly.").

207. *See id.* at 683; *see also id.* at 689-90 (O'Connor, J., concurring).

208. *See supra* notes 126-132 and accompanying text.

209. *See ISKCON*, 505 U.S. at 687 (O'Connor, J., concurring).

210. *Id.* at 686.

211. *Id.* at 688.

lounges, post offices, banks, telegraph offices, clothing shops, drug stores, food stores, nurseries, barber shops, currency exchanges, art exhibits, commercial advertising displays, bookstores, newsstands, dental offices, and private clubs."[212] She reasoned that the Port Authority was operating a shopping mall as well as an airport,[213] which was open to travelers and non-travelers alike,[214] and examined whether the restrictions were reasonable in light of "the multipurpose environment that the Port Authority has deliberately created."[215]

Justice O'Connor argued that the ban on solicitation was reasonable because it might delay travelers, since the "individual solicited must decide whether or not to contribute (which itself might involve reading the solicitor's literature or hearing his pitch), and then, having decided to do so, reach for a wallet, search it for money, write a check, or produce a credit card."[216] She distinguished this from the individual who would just receive a leaflet, since that individual would not need to read the literature immediately and might instead decide to look at it when there was greater time.[217]

Of course, she noted, merely because the distribution of literature was protected would not mean that it would be immune from content-neutral time, place, manner regulation. She pointed out:

> For example, during the many years that this litigation has been in progress, the Port Authority has not banned *sankirtan* completely from JFK International Airport, but has restricted it to a relatively uncongested part of the airport terminals, the same part that houses the airport chapel. . . . In my view, that regulation meets the standards we have applied to time, place, and manner restrictions of protected expression.[218]

Yet, if the Port Authority was able to operate well by using a kind of neutral time, place, manner restriction which limited sankirtan to uncongested areas, much of the rationale justifying the limitation of solicitation would seem to fall by the wayside. Were sankirtan permitted only in those areas which were not crowded, individuals who were in a hurry would presumably not stop to consider the pros and cons of contributing and individuals who might stop because they were not in a hurry would not thereby make the area too congested and delay others who were hurrying.

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212. *Id.*
213. *Id.* at 689.
214. *Id.* at 688.
215. *Id.* at 689.
216. *Id.* (citing United States v. Kokinda, 497 U.S. 720, 733-34 (1990)).
217. *Id.* at 690.
218. *Id.* at 692-93 (citing Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

Justice O'Connor also mentioned the worry posed by fraud.[219] However, the Port Authority did not seem so worried by that, since they permitted sankirtan to be practiced during the litigation. Further, Justice O'Connor was a little circumspect when describing the kind of fraud that was allegedly taking place, neither specifying what kind of fraud had taken place nor by whom.[220] For example, if the worry was that Krishnas were failing to self-identify,[221] then it would seem that a less onerous burden would be to require appropriate identification.[222] Further, if fraud was believed to be such a pervasive problem, it is at the very least surprising that such solicitations were permitted in the areas around the airport or in the airport during the litigation.

Justice O'Connor's analysis was surprising in yet another way. She agreed that the appropriate standard was reasonableness and cited the common-sense proposition that distribution of literature would cause fewer congestion problems than would solicitation. Yet, one might have expected Justice O'Connor to defer to the state's reasonable belief that the distribution of literature might lead people to discuss the contents of the materials, which might lead to congestion and impaired traffic flow.[223] Thus, Justice O'Connor's explanation was surprising in that her failure to defer to the Port Authority's policy on literature distribution indicates that her reasonableness standard was somewhat more robust than one might have inferred—a deferential reasonableness standard would presumably permit a literature distribution ban in both a shopping mall and an airport. Yet, were a more robust reasonableness test employed, the Port Authority's policy on sankirtan during the litigation would suggest that the ban on solicitation was not reasonable, since sankirtan could have been permitted without unduly interfering with passengers trying to catch planes. Assuming that she is using the same reasonableness standard, it is difficult to understand why the solicitation ban was reasonable but the literature ban was not. It may be that Justice

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219. *Id.* at 690 (citing app. 67-111 (affidavits)).

220. *Id.*

221. *Id.* at 684 (citing Int'l Soc'y of Krishna Consciousness, Inc. v. Barber, 506 F. Supp. 147, 159 (N.D.N.Y. 1980)). The New York district court noted some fraudulent practices:

> For example, one ex-devotee from the Baltimore temple was sent out by her Sankirtan leader with two of the best female solicitors of the temple. She was instructed not to wear an identification badge and, if possible, to avoid verbally affiliating herself with the Krishnas to potential donors. If someone were to ask her affiliation, she was taught to try to confuse that person by slurring the word "Krishna" into sounding like the word "Christian." She was also instructed to make up "purposes" for requesting donations. For example, she was told to say that she was soliciting for worldwide education and food distribution programs or children's drug programs.

Id.

222. *Cf.* Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 664 (1981) (Blackmun, J., concurring in part and dissenting in part) ("[R]espondents have offered to wear identifying tags.").

223. *See Lee*, 505 U.S. 830, 832 (1992) (Rehnquist, C.J., dissenting) ("Others may choose not simply to accept the material but also to stop and engage the leafletter in debate, obstructing those who follow.").

O'Connor is employing a less deferential reasonableness test for the literature distribution ban and a more deferential reasonableness test for the solicitation ban because she believes that speech must be given greater protection than fundraising, notwithstanding that the airport is not a public forum and notwithstanding that neither solicitation nor the distribution of literature would seem to fall within the purposes of the airport or the shopping mall.

Justice Kennedy's concurrence in the judgment in *ISKCON* was also surprising. He believed that intermediate scrutiny was the relevant test, but nonetheless felt that the state had met its burden with respect to the solicitation ban. To see why this is somewhat surprising, it is helpful to consider why he believed that the literature distribution ban could not pass muster.

Justice Kennedy noted that the Port Authority argued "that the problem of congestion in its airports' corridors makes expressive activity inconsistent with the airports' primary purpose, which is to facilitate air travel."[224] However, he rejected that argument because the "First Amendment is often inconvenient" [225] and "[i]nconvenience does not absolve the government of its obligation to tolerate speech."[226] He noted that the "Authority has for many years permitted expressive activities by petitioners and others, without any apparent interference with its ability to meet its transportation purposes."[227]

Indeed, Justice Kennedy cited to Justice O'Connor's concurrence discussing the feasible alternatives that had been adopted by airports. Yet, Justice Kennedy failed to note that these alternatives also included ways that groups were permitted to solicit donations,[228] and his point concerning less restrictive policies regarding the distribution of literature might also be made about solicitation policies. After all, he both recognized that "solicitation is a form of protected speech"[229] and that the objectives with respect to solicitation could be achieved without banning it.[230] He simply concluded that these narrower means were not constitutionally required for the solicitation policy but were required for the literature distribution policy, without adequately explaining why that was so.[231]

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224. *ISKON*, 505 U.S. at 701 (Kennedy, J., concurring).
225. *Id.*
226. *Id.*
227. *Id.*
228. *See id.* at 692 (O'Connor, J., concurring).
229. *Id.* at 704 (Kennedy J., concurring).
230. *See id.* at 707 ("other means, for example, the regulations adopted by the Federal Aviation Administration to govern its airports, may be available to address the problems associated with solicitation.").
231. *See id.* ("My conclusion is not altered by the fact that other means, for example, the regulations adopted by the Federal Aviation Administration to govern its airports, may be available to

One aspect of Justice Kennedy's analysis was especially noteworthy, namely, that the ban on the *sale* of books was unconstitutional.[232] Yet, the sale of books might lead to more congestion than would solicitation, given the greater likelihood that change might be required during a sale. Thus, if, as seems reasonable, people who make donations are more likely to give money without expecting change, e.g., by giving change themselves or by their giving a one or five dollar bill without expecting anything back in return, whereas people who make purchases are more likely to use a larger bill and expect money back, then sales might be expected to cause more foot traffic disruption than donations. While the solicitation of funds might cause more congestion than the distribution of (free) literature, e.g., because *some* individuals might need change, the solicitation of funds would presumably cause less congestion than would the sale of literature. Yet, the Port Authority's main argument was that "the problem of congestion in its airports' corridors makes expressive activity inconsistent with the airports' primary purpose,"[233] which means that Justice Kennedy's solution would likely be more disruptive than, for example, permitting solicitation but prohibiting the sale of literature.

The majority *ISKCON* opinion refers to a district court opinion[234] discussing fraudulent practices engaged in by some ISKCON members in the context of donations and sales,[235] e.g., the wrong change might be given or there might be a delay giving change in the hopes that the person waiting for the correct change would grow impatient and leave.[236] This kind of fraud would be more likely to occur in the context of sales than donations if only because of the greater likelihood that change might be expected by those making a purchase. Further, if the worry was that vulnerable travelers might be taken advantage of, e.g., because they are unfamiliar with local language or customs,[237] sales would provide at least as great an opportunity for mischief as requests for donations.

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address the problems associated with solicitation, because the existence of less intrusive means is not decisive.").

232. *See id.* at 708 ("The application of our time, place, and manner test to the ban on sales leads to a result quite different from the solicitation ban.").

233. *Id.* at 701 (majority opinion).

234. *See id.* at 684 (citing Int'l Soc'y for Krishna Consciousness, Inc. v. Barber, 506 F. Supp. 147, 159-63 (N.D.N.Y. 1980)).

235. The *Barber* opinion was referring to training allegedly given to ISKCON members. *See Barber*, 506 F. Supp. at 159-63. At issue in *Barber* were New York State Fair regulations which allegedly would have an adverse effect on ISKCON's ability to practice Sankirtan. *See id.* at 150.

236. *See id.* at 159 ("Other techniques for increasing monetary contributions included: flirting with males, attempting to get people to donate larger bills, intentionally miscounting change, folding over bills to shortchange people, and holding large bills for a long time in an effort to make the donor tired of the idea of getting the desired amount of change back.").

237. *ISKCON*, 505 U.S. at 705 (Kennedy, J., concurring) ("Travelers who are unfamiliar with the airport, perhaps even unfamiliar with this country, its customs, and its language, are an easy prey for the money solicitor.").

Justice Kennedy understood that many of his criticisms about solicitation would "apply to the sale of literature,"[238] but reasoned that "sales of literature must be completed in one transaction to be workable."[239] Solicitation on the other hand need not take place in one transaction—one could seek donations in one place but, for example, give the individuals envelopes and ask them to send the contributions in the mail. Yet, it is at the very least ironic that Justice Kennedy believed that the ban on literature sales must be struck down because "the Port Authority's regulation allows no practical means for advocates and organizations to sell literature within the public forums which are its airports,"[240] given that the Court's ban on solicitation left the Krishnas no practical means by which to solicit donations within airports.

One of the confusing aspects of Justice Kennedy's *ISKCON* concurrence in the judgment is that he offered a much narrower interpretation of the regulation at issue than did the other members of the Court. In Justice Kennedy's view, the only kind of solicitation precluded in the airports was solicitation coupled with the immediate receipt of funds.[241] However, no other Justice expressed agreement with this portion of his opinion,[242] so it is even more unclear what to make of Justice Kennedy's concurrence or even how he would characterize the judgment with which he was concurring, since the limitation on solicitation upheld by that Court seems broader than what he said the Constitution permitted.

Although the Court never expressly discusses Justice Kennedy's interpretation, the Court presumably upheld a ban on solicitation even where the solicitor was not accepting monies but instead, for example, was providing envelopes whereby individuals might send in their contributions, since both the advocacy and the solicitation might lead to congestion, fraud or both, even when not coupled with receipt of funds.[243] However, one infers from Justice Kennedy's concurrence that he did not believe that a solicitation ban would pass constitutional muster if the solicitations were not coupled with the immediate receipt of funds.[244]

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238. *Id.* at 708.

239. *Id.*

240. *Id.* at 708-09.

241. *See id.* at 705 (discussing why it is permissible to prohibit in-person solicitation when that solicitation is coupled with immediate receipt of funds).

242. Justices Blackmun, Souter, and Stevens joined only Part I of Justice Kennedy's opinion. *See id.* at 693.

243. Chief Justice Rehnquist and Justices White, Scalia and Thomas all would have upheld the leafleting ban. *See Lee*, 505 U.S. 830, 831 (1992). They presumably believed that solicitation, even without receipt of money, was permissible to prohibit, because of potential congestion difficulties. Justice O'Connor in her concurrence would presumably uphold a broader solicitation ban than would Justice Kennedy, since both congestion and fraud would still be worries. *See ISKON*, 505 U.S. 690 (O'Connor, J., concurring).

244. *See id.* at 709 (Kennedy, J., concurring) ("the Port Authority has not prohibited all solicitation, but only a narrow class of conduct associated with a particular manner of solicitation") *and id.* at 708 ("Attempting to collect money at another time or place is a far less plausible option in the context of a sale than when soliciting donations . . . .").

Thus, when he says that he is concurring in the judgment, he presumably means that he agrees that solicitation when coupled with immediate receipt of funds is subject to regulation, although it seems likely that many reading the opinion would read the judgment more broadly.[245]

There is some difficulty in interpreting the proselytizing jurisprudence in light of *Heffron*, *ISKCON,* and *Lee*. It might be argued that the Court is simply unsympathetic to the protection of a minority religion,[246] but the Court is upholding the Krishnas' right to proselytize including the right to distribute written literature in airports.[247] The Court has likened solicitation to speech, but is clearly distinguishing them in the ISKCON cases, since the Court is upholding the right to disseminate religious views, while upholding state limitations or prohibitions on solicitation. The Court alludes to worries about fraud, but bases its decisions on worries about traffic congestion. Yet, the traffic flow problem which the Court allegedly finds so worrisome might arise as readily from what the Constitution allegedly protects as from what the Court held was appropriately subject to regulation. In short, the ISKCON cases raise a variety of questions but offer few coherent answers about what the Constitution protects.

CONCLUSION

Claims to the contrary notwithstanding, the Court's jurisprudence with respect to private proselytizing is far from clear. It may well be that part of that lack of clarity involves the Court's own ambivalence about how to treat religious fundraising, especially when part of a ritual. Thus, the *Murdock* Court treated solicitation as akin to preaching and worthy of robust protection, while the *Heffron* Court suggested that solicitation on

245. For example, when the opinion is cited in the literature, it is often cited as upholding the regulation of solicitation rather than as only upholding the regulation of solicitation when coupled with the immediate receipt of funds. *See, e.g.*, Matthew D. McGill, *Unleashing the Limited Public Forum: A Modest Revision to a Dysfunctional Doctrine*, 52 STAN. L. REV. 929, 943 (2000) ("The Court held that the airport was a non-public forum and the ban on solicitation of contributions was a reasonable and viewpoint-neutral exercise of government authority."); R. Alexander Acosta, *Revealing the Inadequacy of the Public Forum Doctrine: International Society for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701 (1992), 16 HARV. J.L. & PUB. POL'Y 269, 269 (1993) ("Holding that airports were non-public fora, the Supreme Court, in *International Society for Krishna Consciousness, Inc. v. Lee*, ('ISKCON'), employed public forum analysis to disallow a prohibition on leafletting but uphold a ban on solicitation in the major airports of the New York City metropolitan area.").

246. *But see* Goldman v. Weinberger, 475 U.S. 503, 524 (1986) (Brennan, J., dissenting) ("A critical function of the Religion Clauses of the First Amendment is to protect the rights of members of minority religions against quiet erosion by majoritarian social institutions that dismiss minority beliefs and practices as unimportant, because unfamiliar.").

247. *Cf.* W. Burlette Carter, Book Review, *Can This Culture Be Saved? Another Affirmative Action Baby Reflects on Religious Freedom*, 95 COLUM. L. REV. 473, 488 n.47 (1995) (reviewing STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION (1993)) ("For example, in telling readers that the Court banned solicitation of money by the adherents in *Krishna Consciousness*, Carter does not mention that, in a companion case, the Court sustained plaintiffs' challenge to a related ban on distributing literature (as opposed to soliciting money) inside the same airport. Whether or not the linedrawing makes sense, the fact is that the Court sided with religious plaintiffs.").

behalf of religions, even when a part of established ritual, was not entitled to greater constitutional protection than was solicitation on behalf of other organizations, whether religious or non-religious. The *ISKCON* Court was willing to uphold a ban on solicitation, notwithstanding that the Port Authority had already demonstrated that solicitation could be limited in a way that would accommodate the needs of airport passengers.

Throughout the ISKCON cases, members of the Court hint that their concern is to prevent fraud. If that was the worry and there was sufficient evidence of fraud,[248] then there was no reason for the Court to contradict the existing jurisprudence. *Cantwell* had already established that states could impose restrictions on solicitation for religious purposes to protect against fraud. The *Heffron* and *ISKCON* Courts go farther than *Cantwell*, however, suggesting that religious solicitation can be prohibited even when less restrictive regulations provide adequate safeguards against fraud. Then, *Stratton* suggests that even the interest in preventing fraud may not suffice when the regulation of religious solicitation is at issue.[249] Thus, the Court is sending very mixed messages with respect to the steps that can permissibly be taken to prevent fraud by those soliciting on behalf of a religion and to the kinds of evidence of past fraud that must exist to justify the state's taking prophylactic measures to prevent future fraud.

Members of the Court have recognized that solicitation limitations can impose a severe burden on religious organizations, but have been ambivalent about whether the possible increased burden on religious groups has constitutional weight. Members also seem ambivalent about whether religious speech, especially when in the context of religious ritual, is entitled to special protection or instead should only be treated in the same way that protected speech is treated more generally.

At least part of the difficulty in interpreting the proselytizing cases is that most of the opinions are compatible with the Court's not giving religious speech and solicitation special consideration. *Murdock* is an exception, suggesting that religious speech deserves extra protection, although the ISKCON cases, especially *Heffron*, seem to stand for the proposition that religious organizations are not to be given special solicitude constitutionally. To add to the interpretive difficulties, the ISKCON cases seem inexplicable both internally and in light of the background jurisprudence. For example, one would have thought that it would be permissible to prohibit all literature distribution in airports if reasonableness were the relevant standard. If the distribution of free literature

248. *But see supra* note 204 and accompanying text (quoting Justice Souter's *ISKCON* dissent in which he notes the very scant evidence of fraud).

249. *See* Watchtower Bible and Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 168 (2002).

could not be prohibited in airports, then it is not clear why a very severe limitation of free literature distribution is permissible at a state fair.

Nor can it be claimed that the proselytizing jurisprudence is best explained by noting that many of the cases offering robust protection were decided in the 1930s or 1940s, since *Stratton* was decided in 2002. Further, to make matters more confusing, none of the Justices deciding *Stratton* even mentioned the ISKCON cases, not even Chief Justice Rehnquist in his dissent.[250] However, the majority opinion does refer to *Cantwell*,[251] *Martin*,[252] *Murdock*[253] *Follett*[254] and *Lovell*,[255] all cases decided in the 1930s and 1940s.[256] It is almost as if the Court believes that the ISKCON cases do not involve proselytizing.

The Supreme Court has suggested that proselytizing, whether or not coupled with solicitation of funds, is accorded robust protection by the Constitution. Yet, the Court has upheld restrictions on proselytizing based on speculation about traffic flow or unsubstantiated allegations of fraud. It may be that members of the Court are distinguishing between speech and solicitation *sub silentio*, but even that does not explain the decisions entirely. The *Heffron* Court upheld and the *Lee* Court struck a limitation on the distribution of written literature, where traffic flow considerations were paramount in both cases, and the potential harms caused by the congestion, e.g., missing a plane versus waiting a little longer before one could enjoy a ride, militated in favor of greater deference in the airport context.

The Court's proselytizing jurisprudence may simply be a function of the Court's confused and confusing approach to the Religion Clauses more generally.[257] Nonetheless, it might at least be hoped that the Court would try to clarify the existing jurisprudence rather than simply pretend that certain cases were never decided or offer justifications that simply are not credible. That does not seem too much to ask, although in an area as contentious as the Religion Clauses,[258] it seems unlikely in the

250. The majority opinion written by Justice Stevens begins at *id.* at 153; Justice Breyer's concurrence begins at *id.* at 169; Justice Scalia's concurrence in the judgment begins at *id.* at 171; and Chief Justice Rehnquist's dissent begins at *id.* at 172.

251. *Id.* at 160, 162.

252. *Id.* at 160, 163.

253. *Id.* at 160-62.

254. *Id.* at 160.

255. *Id.*

256. *Lovell* was decided in 1938, *Cantwell* in 1940, *Martin* and *Murdock* in 1943, and *Follett* in 1944. *See id.* at 160-61.

257. *See* Van Orden v. Perry, 545 U.S. 677, 694 (2005) (Thomas, J., concurring) ("[T]he incoherence of the Court's decisions in this area renders the Establishment Clause impenetrable and incapable of consistent application. All told, this Court's jurisprudence leaves courts, governments, and believers and nonbelievers alike confused—an observation that is hardly new.").

258. For example, those who would preclude a display of the Ten Commandments on constitutional grounds are sometimes accused of being hostile to religion. *See* McCreary County v. ACLU, 545 U.S. 844, 900 (2005) (Scalia, J., dissenting) ("Today's opinion . . . modifies *Lemon* to ratchet up the Court's hostility to religion."); *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring) ("At the

near term that the Court will be able to offer an approach on which the members can even agree, much less one which can plausibly account for the jurisprudence and offer guidance to lower courts.

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same time, to reach a contrary conclusion here, based primarily upon on the religious nature of the tablets' text would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions.").

BOOK REVIEW:

TEN TORTURED WORDS

TEN TORTURED WORDS: HOW THE FOUNDING FATHERS TRIED TO PROTECT RELIGION IN AMERICA . . . AND WHAT'S HAPPENED SINCE. BY STEPHEN MANSFIELD. NASHVILLE: THOMAS NELSON. 2007. $26.00.

REVIEWED BY DAVID K. DEWOLF†

TEN TORTURED WORDS by Stephen Mansfield is not a scholarly work, by the author's own admission. Although he holds a doctorate from Whitefield Theological Seminary and has written a number of best-selling books of history and biography, he is not a specialist in early American history, and he has not attempted to do original research. Moreover, his book is marred by some embarrassing gaffes, most prominent of which is the back of the dust jacket, which describes the ten tortured words "Congress shall make no law respecting an establishment of religion . . . ." as having resulted "[i]n the steamy summer of 1787, as America's founding fathers fashioned their Constitution . . . ." As Chapter 1 accurately describes, the First Amendment was drafted by the new Congress in 1789 and became law in 1791. The error was undoubtedly the result of a careless publicist for Thomas Nelson (the publisher), but there are other examples of a lack of attention to detail.[1]

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1. An extensive and highly critical review of the book has been written by CHRIS RODDA, author of LIARS FOR JESUS: THE RELIGIOUS RIGHT'S ALTERNATE VERSION OF AMERICAN HISTORY (2006). The first installment of the review is found at http://www.talk2action.org/story/2007/8/13/16117/9532/Front_Page/__Stephen_Mansfield_s_quot_Ten_Tortured_Words_quot_A_Book_Review_Part_1_, with links to the second and third installments.

In addition to the dust jacket error, Rodda highlights a sentence in the introduction to Mansfield's book referring to Jefferson's letter to the Danbury Baptists as having been written "fourteen years after the First Amendment became law." Chris Rodda, *Stephen Mansfield's "Ten Tortured Words—A Book Review (Part 1)*, TALK TO ACTION, Aug. 13, 2007, http://www.talk2action.org/story/2007/8/13/16117/9532/Front_Page/__Stephen_Mansfield_s_quot_Ten_Tortured_Words_quot_A_Book_Review_Part_1_. In fact, as Rodda points out, the First Amendment became law in 1791, and it was barely ten years later that Jefferson wrote the letter. *Id.* Similarly, Mansfield refers to "the convention that drafted the First Amendment," when in fact Congress drafted the First Amendment. *Id.* These errors do not affect the weight of Mansfield's claims (there is no significant difference between a ten-year and a fourteen-year gap; Mansfield here misidentifies the body that drafted the First Amendment, but later in the book he carefully reviews the Congressional debates); but they provide cheap ammunition for Mansfield's detractors.

The only significant error I noted is the use of an alleged quotation from James Madison, "Religion is the basis and Foundation of Government." STEPHEN MANSFIELD, TEN TORTURED WORDS:

Although some savage attacks have been directed at the book, they can be ascribed more to the overarching thesis of the book than to a concern that, for example, the date for the adoption of the First Amendment is accurate. Mansfield's overarching thesis is that the popular understanding of the adoption of the First Amendment has been badly distorted. In this Mansfield resembles the boy who points out that the emperor is wearing no clothes. Even if the boy's shirt-tail is hanging out, the question is not what *he* is wearing but whether or not the emperor has any clothes on and whether that ought to cause us concern. As Mansfield demonstrates, the official interpreters of the Constitution (the United States Supreme Court), with no significant objection from mainstream scholars, have maintained an image of the Establishment Clause of the First Amendment that is not only wrong, but so obviously wrong that it is difficult to understand how it could have been maintained for so long with such success. To put it in a nutshell, the commonly accepted notion is that our Founding Fathers, having had a bad experience with established churches, enacted the First Amendment in order to place a wall between church and state; accordingly, so it goes, both the letter of the law and our unbroken tradition compel fidelity to this core principle of the "American experiment."

Mansfield deliberately chooses not to mount an exhaustive legal or historical case against this interpretation. Instead, the five chapters in Mansfield's short book approach his subject by telling a series of stories, each incorporating an actual historical event, but with the overarching theme of puncturing some popular but misguided myth about the Establishment Clause. Chapter 1 tells the story of how the First Amendment was adopted. Chapter 2 addresses the role of Thomas Jefferson in how the Founding Fathers understood the relationship between church and state, in particular the letter that Thomas Jefferson wrote to the Danbury Baptist Association in which he used the phrase "wall of separation

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HOW THE FOUNDING FATHERS TRIED TO PROTECT RELIGION IN AMERICA . . . AND WHAT'S HAPPENED SINCE 146 (2007). Although he cites Robert Rutland's collection of Madison's papers and the words he quotes do appear, they are separated by several intervening words, indeed pages, and the omission is not acknowledged in the quotation. Although "Religion" is in Madison's *Memorial and Remonstrance*, and Madison talks about "the basis and foundation of government," the subject of the latter phrase is the Virginia Declaration of Rights, not "Religion." *Id.*

It turns out that the same quotation is found in DAVID BARTON'S book THE MYTH OF SEPARATION 120 (3d ed. 1992) (1989), although he withdrew it from a later edition of the book, ORIGINAL INTENT: THE COURTS, THE CONSTITUTION, & RELIGION (1996). Rodda cites similar examples of Mansfield's borrowing from the scholarship of David Barton, which is neither here nor there in terms of the validity of Mansfield's argument, but it again suggests that in providing a popular, as distinguished from scholarly, treatment of the subject Mansfield would have been wise to obtain the assistance of a knowledgeable proofreader, who would have spared him a lot of grief. All of this is unfortunate since the primary claims that Mansfield is making, as the rest of this review describes, would not be affected by correcting the errors that are pounced upon by Mansfield's critics.

between church and state."[2] Chapter 3 describes the opinion in *Everson v. Board of Education*[3]—the first decision by the United States Supreme Court to treat the Jeffersonian phrase as the Rosetta Stone for interpreting the First Amendment. Chapter 4 describes the rise of the ACLU and Americans United for Separation of Church and State, and their use of litigation, particularly the fee-shifting provisions in the United States Code, to enforce the separationist vision. Finally, Chapter 5 is a bit of an altar call—it describes how the distorted vision of a secular America can and probably will be replaced by one that corresponds more closely to the Founders' vision for America. Each chapter bears closer inspection.

Chapter 1, "What the Founders Founded," tells what should be the well-known story of how the First Amendment was adopted. In the popular mind, even in widely accepted scholarly treatments of the First Amendment, the Founders self-consciously rejected the past practices of the American colonies, which featured an overlap between religious and governmental authority. As Frank Lambert, Professor of History at Purdue University, puts it in his book *The Founding Fathers and the Place of Religion in America*, the attitude of the "Planting Fathers" contrasts sharply with the vision of the "Founding Fathers." Whereas the Planting Fathers wanted to establish a "City upon a Hill" and thought that religion and state were inextricably linked,

> The Founding Fathers had a radically different conception of religious freedom. Influenced by the Enlightenment, they had great confidence in the individual's ability to understand the world and its most fundamental laws through the exercise of his or her reason. To them, true religion was not something handed down by a church or contained in the Bible but rather was to be found through free rational inquiry. Drawing on radical Whig ideology, a body of thought whose principal concern was expanded liberties, the framers sought to secure their idea of religious freedom by barring any alliance between church and state.[4]

2.
> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and State.

THOMAS JEFFERSON, Letter from Thomas Jefferson to a Committee of the Danbury Baptist Association (Jan. 1, 1802), *in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 332, 332 (Adrienne Koch & William Peden eds., 1972) (1944). In fact the use of the phrase "wall of separation" in this context originated with Roger Williams, who advocated a "hedge or wall of separation between the garden of the church and the wilderness of the world." PERRY MILLER, ROGER WILLIAMS: HIS CONTRIBUTION TO THE AMERICAN TRADITION 98 (Atheneum, 1962) (1953).

3. 330 U.S. 1 (1947).

4. FRANK LAMBERT, THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA 3 (2003). This quotation was used (originally without attribution, presumably because it was not thought to present anything particularly original), in a commencement address by Judge John E.

(To mitigate some of the embarrassment from the anachronism on the dust jacket of Mansfield's book, it is significant that Lambert places the defining moments in our nation's history to be 1639 and 1787, thus blurring the distinction between the adoption of the Constitution and the adoption of the First Amendment.[5])

A brief consideration of Lambert's description illustrates the central point that Mansfield makes in Chapter 1: We have the story fundamentally wrong. Neither the Constitution written in 1787 nor the First Amendment drafted in 1791 and ratified in 1791 "barr[ed] any alliance between church and state." It would be more accurate to say that the First Amendment *protected* those existing establishments of religion. In fact, it was in part the fear that the national government would interfere with state establishments of religion that produced the language of the Establishment Clause—the ten tortured words.[6]

How could something so obvious as the purpose of the First Amendment be turned on its head? One answer of course is that, regardless of what was intended by the First Amendment, later constitutional developments, such as the adoption of the Fourteenth Amendment, might have accomplished precisely what Lambert and others claim was in-

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Jones, who decided *Kitzmiller v. Dover Area School District*, 400 F. Supp. 2d 707 (M.D. Pa. 2005). *See* Judge John E. Jones III, Commencement Address at Dickinson College (May 21, 2006), http://www.dickinson.edu/commencement/2006/address.html.

5.

> The constitution that [George Washington] swore to uphold was the work of another group of America's progenitors, commonly known as the "Founding Fathers," who in 1787 drafted a constitution for the new nation. But unlike the work of the Puritan Fathers, the federal constitution made no reference whatever to God or divine providence, citing as its sole authority "the people of the United States." Further, its stated purposes were secular, political ends: "to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty." Instead of building a "Christian Commonwealth," the supreme law of the land established a secular state. The opening clause of its First Amendment introduced the radical notion that the state had no voice concerning matters of conscience: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." [citation omitted] In debating the language of that amendment, the first House of Representatives rejected a Senate proposal that would have made possible the establishment of the Christian religion or of some aspect of Christian orthodoxy. [citation omitted] There would be no Church of the United States. Nor would America represent itself to the world as a Christian Republic.

LAMBERT, *supra* note 4, at 2. Just as 1639 represents a defining moment in Americans' religious heritage, so does 1787. *Id.*

6. *See generally* Van Alstyne, *What is "an Establishment of Religion"?*, 65 N.C. L. REV. 909, 910 (1987) (suggesting that the intent of the First Amendment may have been simply to prevent the federal government from usurping states' power to establish religion). Of course, the First Amendment was also drafted to specify how the national government would deal with religion; it could neither make a law that would establish religion, nor could it prohibit the free exercise of religion. But in between those two extremes there was room for nonpreferential aid to religion and nondiscriminatory enforcement of laws (e.g., against polygamy) that might impinge on the practice of religion. It is not clear that the Founders had a clear conception of the appropriate boundaries to be drawn in limiting government action affecting religion. Like many commentators, I have proposed my own set of principles: David K. DeWolf, *State Action under the Religion Clauses: Neutral in Result or Neutral in Treatment?*, 24 U. RICH. L. REV. 253 (1990).

tended by the Founding Fathers. (Whether the Fourteenth Amendment, or any other constitutional authority in fact did so is a significant part of the discussion in Chapter 3 of Mansfield's book.) Even conceding, as every examination of the First Amendment must, that the First Amendment not only did not impose separation of church and state upon the states, but prevented the federal government from interfering with the establishment of religion or the suppression of the exercise of religion, defenders of the popular understanding will say that the Fourteenth Amendment changed the landscape. We will deal with that question later in this review. But whatever was done in the late 1800's cannot be used to interpret the intention of the Founding Fathers. To say that the Founding Fathers "barr[ed] any alliance between church and state" is so wildly inaccurate that one searches for other explanations of how such a characterization could be made. Even the existence of established state churches, of which there were five at the time of the Constitutional Convention,[7] is not seen as irrefutable proof that the purpose of the First Amendment was *not* to bar an alliance between church and state, but rather is assumed to show that most states had by that time rejected the idea of an established state church (from the time of Revolutionary War broke out in 1775 until the Constitutional Convention the number of colonies with established churches dropped from nine to five[8]).

By reading back into the Founding Fathers' later decision to abandon state establishments of religion, historians like Frank Lambert claim for them an attitude that they simply did not share: that public life could be governed by secular principles, while private life would be guided by whatever source of spiritual sustenance the individual chose. It is precisely to refute this notion that Mansfield describes, albeit in abbreviated and popular fashion, a more accurate history of how the First Amendment was adopted and what it was intended to accomplish.

The most basic starting point for the First Amendment is to identify the impetus for the Bill of Rights generally and the First Amendment in particular. This part of the history is generally agreed upon: In the debates over the ratification of the proposed constitution, the primary criticism of the new constitution was that its grant of greater power to the national government left the states and ordinary citizens vulnerable to the usurpation of their rights and prerogatives. Although the Constitution in theory granted only limited powers, history is replete with examples of limited power turning into unlimited power, and the anti-federalists argued that the new Constitution offered precious little protection from yet

7. MANSFIELD, *supra* note 1, at 120, (citing ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 4 (1982)).

8. *Id.*

another installment in that sorry history.[9] The defenders of the Constitution tried to reassure the state ratifying conventions that the Constitution only gave the national government enumerated and limited powers, and that it was more dangerous to specify limitations on that power, since any omission from the list of limitations could be converted into a claim of implied authority. But this argument in the end was successful only by tying it to a promise that after the Constitution was ratified it would be supplemented by a Bill of Rights in which explicit limitations were placed upon the national government. The resulting "Gentleman's Agreement" paved the way for the ratification of the Constitution.[10]

In other words, it would be a mistake to characterize the Bill of Rights as a guarantee of the rights of the people *in general*; instead it was a limited protection against depredation by the national government. It supplemented the enumerated powers limitation by further requiring that even if the national government were engaged in an activity authorized by Articles I, II or III of the Constitution, it could only do so within the boundaries set up by the Bill of Rights. What is typically forgotten (or deliberately obscured) in the popular telling of the story of the Bill of Rights is that the states retained the power to do precisely those things (establishing a state religion, punishing unpopular speech, denying the right to trial by jury, etc.) that were forbidden to the national government. Of course, that allocation of power may have been drastically altered by subsequent events, but if so, we should locate the authority for limiting state power in subsequent events, not in the design of the Founders.

Chapter 2 of TEN TORTURED WORDS, "Of Cheese, Walls, and Churches," addresses the role that Thomas Jefferson played in the erection of the wall between church and state. He is significant for two reasons. First, he is the author of the phrase "wall of separation between church and state"; and second, he is iconic of the mind of the Founders. More than almost any of the Founders, he is given credit for verbalizing the beliefs that led to the Revolution, to the adoption of the Constitution, and to the Bill of Rights. Jefferson of course was the primary author of the Declaration of Independence, but he was in France when the Constitutional Convention met, as well as when the First Amendment was drafted, debated, and adopted (although he returned in time to observe its ratification). But when President John F. Kennedy made the famous remark in front of forty-nine Nobel Laureates that the combined talent and human knowledge assembled in the room were exceeded only by the

9. *See, e.g.*, Thomas B. McAfee, *Restoring the Lost World of Classical Legal Thought: The Presumption in Favor of Liberty over Law and the Court over the Constitution*, 75 U. CIN. L. REV. 1499, 1560-61 (2007).

10. Under this "Gentleman's Agreement," "the federalists made important concessions, and in exchange, the moderates agreed to support the Constitution." Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 WM. & MARY BILL RTS. J. 73, 82 (2005).

occasions when Thomas Jefferson dined alone,[11] he exemplified the kind of reverence in which Jefferson is held in the public understanding of the American experiment. Thus, if Jefferson was indeed a passionate separationist, that fact (in addition to the phrase he composed) might affect our understanding of the Founders' vision for the way in which religion and government would coexist in the new republic.

Mansfield approaches the subject by telling the story of the Danbury Baptists to whom the letter was written. On the same day that Jefferson wrote the letter to the Danbury Baptists, he had publicly welcomed the arrival of a half-ton of cheese that was the gift of another group of New England Baptists, from Cheshire, Massachusetts, anxious to express their affection and support for a President they thought might sympathize with their plight of being a minority religion in a state that still recognized Congregationalism as the official state religion.[12] Indeed, Jefferson did sympathize with them, and it is clear from the letter that Jefferson favored a much more restrictive role for government in promoting religion. On the other hand, Mansfield makes two important points. First, although Jefferson claims in his letter that the First Amendment was an act of the whole American people "building a wall of separation between church and state," this statement should not be taken (as it has been since the *Everson* opinion, addressed by Mansfield in Chapter 3) as an authoritative description of the purpose, much less the legal effect, of the First Amendment.

Mansfield reviews the basic, almost irrefutable, reasons for refusing to accord such weight to Jefferson's phrase. First, Mansfield recalls the history of the origin of the First Amendment, previously described in Chapter 1. It was not to satisfy separationists (assuming Jefferson to be one) that the amendment was proposed, but precisely to prevent separationist impulses (or for that matter, sectarian impulses) in the national government from interfering with whatever approach to religion (including state establishment of religion) then prevailed in the several states. Second, Jefferson took no part in the actual drafting of the First Amendment, and thus could not be considered an authoritative source for what was meant by the language of the amendment. Third, the letter to the Danbury Baptist Association was written long after the amendment had been drafted, passed, and ratified, and at a time when Jefferson occupied a political office. As a politician Jefferson was entitled, even obligated, to advance a more partisan agenda than the one he advocated when he occupied the more statesman-like role as one of the Founding Fathers. Finally, when Jefferson referred to the wall between "church and State," he probably meant "State" to mean the national government (which is the

11. Remarks at a Dinner Honoring Nobel Prize Winners of the Western Hemisphere, 1962 PUB. PAPERS 347 (Apr. 29, 1962).

12. Connecticut did not abandon Congregationalism until 1818; Massachusetts did so in 1833. MANSFIELD, *supra* note 1, at 120.

target of the First Amendment), not our more generic understanding of "state" as governmental power in general.

But I would like to amplify a point that Mansfield makes by drawing on the rules of interpretation in a legal context. When a contract is being made between two parties, the meaning of the contract depends upon the external manifestations of the parties, not any hidden subjective intent. Suppose my neighbor loves to burn wood in his fireplace but lacks any ready supply of firewood. I, by contrast, have lots of firewood. On the other hand, I would prefer (if I did not need money) to leave my property in its natural state. Suppose he and I walk through my property identifying firewood that would meet his needs, and we subsequently enter into a contract that states "In exchange for $500, Neighbor has the right to collect a one-year supply of firewood for his personal use from DeWolf's property." If a subsequent court is required to interpret this contract (as to the amount of firewood contemplated by "personal use," or what equipment Neighbor may use in harvesting the firewood), a court will look at the objective manifestations of my behavior; the fact that I believe that wood-burning is a form of air pollution, or that I hate chain saws, will form no part of the "intent of the parties" reflected in the contract.[13] Even if I wrote the words to the contract that we both signed, it is my *actions* (including words I spoke in the formation of the contract), not what I subjectively *thought* or *believed*, that will control. Thus, even if Jefferson had been an author of the First Amendment, or others sharing his point of view (like Madison[14]) were key contributors to the language of the Constitution or the First Amendment, it was the representation of its meaning to the ratifying state conventions that determines what the Constitution and the Bill of Rights meant from a legal standpoint. Once it became clear that the lack of a Bill of Rights was a major stumbling block to securing approval of the Constitution, and after the proponents of the Constitution promised that the addition of a Bill of Rights would be the first order of business for the new Congress, the Constitution was ratified.[15] Thus, the meaning of the First Amendment is not to be found

13. On the other hand, the intention of the *Neighbor* may be relevant, if it is either expressed (thus forming part of the basis of the agreement) or if it can be demonstrated that the actual intent of one of the parties is so different from what the other party thought the bargain was about. In the case of the ratifiers of the First Amendment, they clearly thought that the Bill of Rights was the payment on the promissory note executed by the Federalists to secure ratification of the Constitution. *See* Natelson, *supra* note 10, at 82-84, 87.

14. Madison's subjective intent, based on writings he produced in other contexts, is often cited as the meaning of the First Amendment, but it is clear that despite Madison's preeminent role in the drafting and the historical record of the Constitutional Convention and the drafting of the Bill of Rights, Madison frequently acted as a facilitator and his personal preference was frequently set aside by the majority. For example, Madison favored giving the national government the power to override state actions that violated individual liberties, but the majority wanted to retain the autonomy of the states. 1 ANNALS OF CONG. 440-42 (Joseph Gales ed., 1834); *see generally* Natelson, *supra* note 9.

15. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 37-38 (Random House 2005).

in the subjective intent of those who put the words on paper, but in the communicated demands of the state ratifying conventions, who made it clear that they wanted to protect the states and individual citizens from having the *national* government tell them what to do; the power of the states to regulate their own relationship with the people was to be left undisturbed.[16] At the risk of becoming repetitious, this is the principle that has been stood on its head in the frequent citation of Jefferson and other Founders as the origin of a "right" to prevent the endorsement of religion by state or local governments.

Mansfield also spends considerable time exploring Jefferson's true feelings about religion in general and Christianity in particular, and whether he can properly be claimed for the Deist or even the infidel position. Mansfield cites a number of sources suggesting that Jefferson was more pious than is popularly assumed,[17] and that his theological beliefs, while less orthodox than those of the other Founders, were not a placeholder for the kind of militant secularism that is being advanced today. The debate is likely to continue about Jefferson, and this part of the book is less persuasive precisely because in the end it hardly matters. Jefferson was likely a conflicted soul, who found himself unable to affirm key tenets of orthodox Christianity, and feared the influence on civil society of religious institutions,[18] but he never disputed (and seems to have agreed with) the assumption that religious belief was critical to maintaining a republican form of government. When John Adams said that our form of government required a religious people,[19] or when George Washington's Farewell Address reminded his listeners that to subvert religion and morality would be to abandon true patriotism,[20] they were expressing

16. As one example, while the Constitution prohibited the national government from employing a religious test for public office (Article VI), in 1789 "[a]ccording to one tally, eleven of the thirteen states had religious qualifications for officeholding." AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 33 (Yale University Press 1998).

17. Mansfield repeats the story of Jefferson's encountering someone on his way to church and assuring him that "no nation has ever yet existed or been governed without religion. Nor can be." MANSFIELD, *supra* note 1, at 49-50. Critics of Mansfield have accused him of exaggerating Jefferson's personal piety and relying on apocryphal accounts. *See* RODDA, *supra* note 1 ("I have to wonder if this best-selling author even realizes that he is spreading an inaccurate and deceptive version of American history to a new and wider audience."). But the quotation is believed by many competent historians to be reliable. *See* GERTRUDE HIMMELFARB, ONE NATION, TWO CULTURES 86 (2001) (based on "recently discovered handwritten history of a Washington parish"); *see also* James H. Huston, *James H. Huston Responds*, THE WILLIAM AND MARY QUARTERLY, 3rd Ser., Vol. 56, No. 4. Oct., 1999, at 823-824.

18. "History, I believe, furnishes no example of a priest-ridden people maintaining a free civil government. This marks the lowest grade of ignorance of which their civil as well as religious leaders will always avail themselves for their own purposes." Letter from Thomas Jefferson to Baron von Humboldt (Dec. 6, 1813), *available at* http://lcweb2.loc.gov/cgi-bin/query/r?ammem/mtj:@field(DOCID+@lit(tj110127)).

19. "Our constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other." MANSFIELD, *supra* note 1, at 144; John Adams, To the Officers of the First Brigade of the Third Division of the Militia of Massachusetts (Oct. 11, 1798), *in* 9 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 229 (Charles Francis Adams ed., 1854).

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an almost universally shared belief, even if there was passionate debate over whether it was a proper object of government to encourage such belief. Jefferson may have defended the position that not one penny of government support should be furnished to religious institutions, but he was not indifferent to the benefits from religion, either on a personal level or as a basis for political stability. But regardless of how he reconciled the conflict these sentiments might have created, Jefferson's views ultimately have precious little to say about the meaning of the First Amendment.

This logically takes us to Chapter 3, "The Turning," which focuses on the case in which Jefferson's phrase and the separationist view was adopted by the United States Supreme Court. Again, Mansfield begins with a story—the story of the murder of a Catholic priest in Alabama in 1921 and the lawyer who successfully appealed to the religious and racial biases of the jury in securing an acquittal for the murderer. The lawyer subsequently joined the Ku Klux Klan—and later the Supreme Court.[21] The lawyer of course was Hugo Black, and in many ways his fleeting membership in the Ku Klux Klan is irrelevant to the opinion he wrote in 1947 approving tax-supported reimbursement of bus transportation for Catholic school students. But part of Mansfield's purpose in telling the story is to dislodge the sort of reverence that has been accorded to the string of U.S. Supreme Court opinions imposing stringent limitations on governmental support of religion.

Most lawyers, but few lay people, know the story of how the Establishment Clause was first invoked as a limitation on what state or local government could do to support religion. In *Everson v. Board of Education of Ewing Township*,[22] a group of taxpayers challenged a school district's policy of reimbursing parents for the cost of bus fares to transport their children to school, including both the public high schools and "the Catholic schools." Justice Black wrote the majority opinion, which framed the issue as whether or not the policy violated the "wall of separation between church and state" mandated by the Constitution. Justice Black (along with the rest of the Court) assumed that the First Amendment, by way of the Fourteenth Amendment, made it unconstitutional to

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> Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of Patriotism who should labor to subvert these great Pillars of human happiness, these firmest props of the duties of men and citizens. . . . Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.

GEORGE WASHINGTON, FAREWELL ADDRESS (Sept. 19, 1796), *reprinted in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 205, 212 (New York, Bureau of Nat'l Literature 1897), *available at* http://gwpapers.virginia.edu/documents/farewell/transcript.html.

21. An account of the trial and controversy over Hugo Black's Klan membership can be found in William H. Pryor, Jr., *The Murder of Father James Coyle, the Prosecution of Edwin Stephenson, and the True Calling of Lawyers*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 401, 407 (2006).

22. 330 U.S. 1 (1947).

"contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church."[23] Having laid down the principle, Black's opinion proceeded to apply it to the facts of the case, and concluded that the policy was *not* a support to the schools, but rather was an extension of "general state law benefits."[24] Only four of the other members of the court agreed with him; the other four vigorously dissented, finding that in meeting the transportation needs of the Catholic school students, the school board was supporting the religious mission of the school. In arguing over the application of the principle to the facts of the case, no one questioned the way in which the principle was expressed, or its application of the First Amendment to the actions of state and local government.

Mansfield spends several pages reviewing the legitimate questions that can be raised about whether the 14th Amendment was intended to reverse the logic of the original Bill of Rights and disable the states in precisely the same way that the federal government was disabled by the Bill of Rights.[25] There are good reasons to be skeptical, including the contemporaneous rejection of this argument in several U.S. Supreme Court cases.[26] Moreover, particularly in the case of the religion clauses, the logic of the First Amendment (preventing the national government from interfering with states' regulation of religion) makes no sense if one simply substitutes "state" for "Congress" (or "national government"). Finally, as Mansfield demonstrates through the opinion of Justice William Rehnquist in *Wallace v. Jaffree*,[27] the "wall of separation" metaphor has proven to be unworkable in practice as well as being based on a misreading of history. But the debate over the incorporation doctrine is voluminous and complex; even if one rejected the rationale presented in *Everson*—and Mansfield explains why one should—one might legitimately ask whether there is a substitute principle that limits the power of state or local government to promote or suppress religious belief and practice. The lack of such a principle may help explain the perpetuation of the stunning anachronism of using the language and intentions of Jefferson and Madison as the basis for imposing constitutional limits on tax support for parochial schools. But it is not Mansfield's purpose—or his responsibility—to reconfigure the law defining the limits of governmental action affecting religion. His object was to correct an inaccurate account of our history, and in this he succeeds quite well.

Nonetheless, because Mansfield did not attempt a lawyer's argument about the Constitution, I cannot resist an avenue that would have

23. *Id.* at 16.
24. *Id.*
25. *See* the discussion in text accompanying notes 8 and 9.
26. Slaughter-House Cases, 83 U.S. 36 (1873). *See generally* Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253, 256 (1982).
27. 472 U.S. 38, 66 (1985).

shed a slightly different light on Justice Black's opinion. To use one of the basic tools of legal analysis, Justice Black's claims regarding the incorporation doctrine and Jefferson's wall of separation were plainly dicta—that is, they were not necessary to the holding of the case and thus did not constitute binding precedent, even under the principle of *stare decisis*. In fact, the next case to address the issue of state aid to religious schools, *Board of Education v. Allen*,[28] was not decided until twenty years later, and it too permitted state aid to parochial schools in the form of providing textbooks. Thus, although the Court had used language that sounded very threatening to the type of non-preferentialist support for religion that Mansfield persuades us the Founders would have permitted, the Court had *protected* such aid from constitutional attack for almost a quarter century after the *Everson* case. In fact, in the *Allen* case the Court explicitly rejected the argument made by Justice Black in a furious dissent that aiding the educational mission of the parochial school violated the constitutional prohibitions in a way that transporting children in the Ewing Township did not.[29] Only in 1971, in the famous decision of *Lemon v. Kurtzman* (source of the so-called *Lemon* test),[30] did the U.S. Supreme Court for the first time invalidate state aid based upon the dicta in *Everson*.[31] Thus, in seeking the guilty party for the unworkable *Lemon* test one might turn more readily to Chief Justice Burger's misplaced pragmatism in *Lemon* than to the bad history found in Justice Black's dicta in *Everson*.

Mansfield doesn't follow this branch of the *Everson* progeny, but instead cites the myriad examples of the arbitrary application of the *Lemon* test. The *Lemon* test is not the only judicially formulated rule that is vulnerable to criticism, but it helps to prove Mansfield's point about the significance of our Establishment Clause jurisprudence having been built upon a bad foundation. It is particularly ironic that those who defend decisions protecting the "wall of separation between church and state" often treat this phrase as though it were the cornerstone upon which the republic was built and that abandoning it would constitute

28. 392 U.S. 236, 238 (1968).

29. *See* DeWolf, *supra* note 6, at 253.

30. 403 U.S. 602, 612-13 (1971). Under the *Lemon* test, a state action is unconstitutional unless (1) it has a secular purpose; (2) it has a primary effect that neither advances nor inhibits religion; and (3) it does not result in excessive entanglement between the state and religion. *Id.*

31. It is true that the U.S. Supreme Court had invalidated religious instruction on school grounds and state-sponsored school prayer. *See* Abington Sch. Dist. v. Schempp, 374 U.S. 203, 205 (1963); Engel v. Vitale, 370 U.S. 421, 433-36 (1962); McCollum v. Bd. of Educ., 333 U.S. 203, 231-32 (1948). But these could be distinguished in that they were the direct involvement of the state in religious practice or instruction. *Everson* and *Allen* appeared to countenance governmental aid flowing to religious organizations as long as the aid was available on a neutral basis and did not require entanglement with the religious aspect of the schools. Thus, *Lemon*, while it incorporated the dicta from *Everson*, was in sharp contrast to the actual legal precedent. Moreover, it was flatly inconsistent with its companion case, *Tilton v. Richardson*, which permitted state aid to flow almost without restriction to religious colleges and universities. 403 U.S. 672, 687-88 (1971). *See generally* DeWolf, *supra* note 6, at 253.

capitulation of constitutional principle in favor of mob rule. As Mansfield points out, however, nothing could be further from the truth. Most Americans are quite happy with a general policy of keeping religious authority and governmental authority separate; but they also puzzled by the zeal with which religious expression has been excluded from the public square. When the U.S. Supreme Court insists on counting reindeer in a "winter holiday" display[32] or agonizes over the placement of the Ten Commandments on government property, they cannot claim the authority of the Founders.

Mansfield then moves on in Chapter 4, "Faith-Based Blackmail," to detail the way in which litigating Establishment Clause cases has become a cottage industry for organizations like the American Civil Liberties Union and Americans United for Separation of Church and State. Again, he begins with a story. The protagonist in this chapter is an ACLU attorney inspired by his hero Cesar Chavez, who started his legal career fighting the good fight for union workers and civil rights. He eventually grew disillusioned with the ACLU's use of techniques that capitalize on the "fee-shifting" provisions of the civil rights laws.[33] Fee-shifting was originally a device to insure that victims of racial discrimination would be able to enforce the civil rights laws, but today it is applied to a much broader set of cases.

It works like this: If the policy or practices of a public entity, say a school board, are challenged by the ACLU,[34] that public entity faces a scary prospect. If the case is litigated, and the school board loses, it will be forced to pay the attorney fees incurred by the ACLU in litigating the case. On the other hand, if the school board succeeds in defending its policy or practices, it has no statutory right to recover *its* fees, and it will still incur the expense of hiring its own lawyers. Since the ACLU is often able to recruit volunteer lawyers who will pursue the case *pro bono* based on their commitment to the agenda of the ACLU, there is a huge risk on one side and very little risk on the other. It is no surprise that where the legal status of the policy is in the least doubtful, the school board will have a strong incentive to capitulate.

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32. In *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984), the Supreme Court narrowly upheld a "seasonal display" by the city of Pawtucket, Rhode Island, which included a crèche along with Santa Claus and reindeer. In describing the difficulty of applying the test for what violates the Establishment Clause, Judge Nelson of the Sixth Circuit complained:

> The application of such a test may prove troublesome in practice. Will a mere Santa Claus suffice, or must there also be a Mrs. Claus? Are reindeer needed? If so, will one do or must there be a full complement of eight? Or is it now nine? Where in the works of Story, Cooley or Tribe are we to find answers to constitutional questions such as these?

Am. Civil Liberties Union v. City of Birmingham, 791 F.2d 1561, 1569 (6th Cir. 1986) (Nelson, J., dissenting).

33. 42 U.S.C. § 1988 (2006).

34. The same principle applies to litigation brought by Americans United for Separation of Church and State and similar organizations, and in some cases more than one group will work together, as they did in the case of *Kitzmiller v. Dover Area School Board*, 400 F. Supp. 2d 707, 709-710 (M.D. Pa. 2005). I will use the ACLU as the prime example for convenience.

Now it is only fair to point out that religious groups have used this same "fee-shifting" provision of the law to extract attorney fees from public entities, including school boards, that violated the First Amendment by, for example, refusing to provide equal access to student groups with religious viewpoints.[35] One might conclude from this fact that the law operates symmetrically—that is, it is no more permissible (and therefore incurs a symmetrical risk) to discriminate *against* religion as to discriminate *for* religion. But this appearance of symmetry is deceptive. The best way to illustrate this is by example. I have often had occasion to reflect on the Establishment Clause during the choir performances at the public schools my children have attended. For the "Winter Holiday" concert, the director must select music suitable to the season. A natural candidate would be Christmas music—religious music. What is the relative likelihood that a federal judge would find the selection unconstitutional if the percentage of Christmas carols (traditional Christian music) were 0%? 25%? 50%? 100%? It seems inconceivable that a parent who complained that none of the songs had religious content would succeed in obtaining an injunction and attorney fees.[36] On the other hand, if 100% of the songs were Christmas carols, it would be very easy to claim that the policy constituted an endorsement of Christianity.[37] We have been acclimated to the consequences of a school district appearing to be "too religious." But imagine for a moment if federal judges started punishing school districts for being "insufficiently religious" with injunctions and huge attorney fee awards. One can hear the—justified—howls of outrage. Yet precisely that is what has happened (with the identities reversed) when a school district has been found to be "too religious." For example, when the Dover, Pennsylvania School Board adopted a policy requiring that students hear a four-paragraph statement about intelligent design at the beginning of their study of evolution, it was sued

35. *See, e.g.*, Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five, 470 F.3d 1062, 1074 (4th Cir. 2006) (holding defendant school district's denial of access to school facilities based upon discrimination against plaintiff's religious viewpoint entitled plaintiff to recoup attorney fees).

36. Sechler v. State Coll. Area Sch. Dist., 121 F. Supp. 2d 439, 453 (M.D. Pa. 2000) (discussing how a "winter holiday" "song program" at public elementary school that featured Kwanzaa and Chanukah songs, but no songs reflecting the Christian origin of the Christmas holiday, was not a violation of the Establishment Clause).

37. School districts are very sensitive to the accusation that their inclusion of religious music or religious art might create the impression of an establishment of religion. *See, e.g.*, Florey v. Sioux Falls Sch. Dist. 49-5, 619 F.2d 1311, 1319 (8th Cir. 1980) (holding school district policy that permits singing of Christmas carols was not unconstitutional on its face). However, perfect neutrality is impossible. When my oldest son was in the sixth grade the "Winter Holiday" concert at his elementary school featured each grade in succession, from youngest kindergarten to 6th grade, singing a variety of secular and religious carols. Just before the last number on the program the students put on white gloves, which puzzled me. Then they began to sing Silent Night, which I thought was very fitting. But after the first verse, the stage lights went out and the students were bathed in black light. All that could be seen was their white gloves, and while the accompanist played the music to Silent Night, the students silently "sang" the words in sign language. I was moved to tears. I felt great admiration for the bravery of the choir teacher, but reflected bitterly on the fact that my reaction could be Exhibit A in a suit to attack the practice under the Establishment Clause.

and lost. After trial they were threatened with a $2 million attorney fee bill, and settled by paying over $1 million.[38]

In terms of the title of Chapter 4, "Faith-Based Blackmail," lest it appear to be an exaggeration or hyperbole, consider these words from the lawyer who succeeded in forcing the Dover School Board to abandon its policy of telling students about intelligent design: "This sends a message to other school districts contemplating intelligent design that the price tag can be truly substantial . . . ."[39] Precisely. If school boards were being threatened with similar penalties for not being sufficiently religious, what would we call such a legal climate? Faith-based blackmail? Should we not be just as outraged if the identities were reversed?

Lest Mansfield's readers end on a note of despair, he includes a fifth chapter, "The Return." In it he sounds an optimistic note based on two converging phenomena. On the one hand, we have the public appetite for religion resulting from the 9/11 tragedy and other reminders of our individual and corporate need for God. On the other, we have militant atheism represented by such figures as Christopher Hitchens[40] and Richard Dawkins,[41] who agree with religious believers that religious ideas matter, but they disagree with the Founders about whether religious belief has a positive effect on the body politic. Until recently religious belief had been relegated by the cultural elite to the status of a personal preference—a leftover from a bygone era that might provide individuals with a source of comfort and reassurance in times of stress, but that was largely irrelevant to the important questions of how we should live.[42] Hitchens, Dawkins, and others have reminded Americans that ideas do have consequences, and that our Founders' conviction about the relationship between religious belief and our body politic deserves renewed attention.

This relationship—between the religious imagination and public policy—is one that Mansfield emphasizes throughout the book. Every American war has been fought not only by soldiers, but with the help of clergy who helped Americans understand what the fight was all about.

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38. *Kitzmiller*, 400 F. Supp. 2d at 709. The attorney team representing the parents claimed that their fees were over $2 million, but they agreed to settle with the school board for over $1 million. Amy Worden, *Dover District to Pay $1 million in Legal Fees*, PHILADELPHIA INQUIRER, Feb. 22, 2006, at B01; *see also* David K. DeWolf, John West, and Casey Luskin, *Intelligent Design will Survive* Kitzmiller v. Dover, 68 MONT. L. REV. 7, 8 (2007).

39. Worden, *supra* note 38, at B01 (quoting Richard Katskee, attorney for Americans United for Separation of Church and State).

40. CHRISTOPHER HITCHENS, GOD IS NOT GREAT: HOW RELIGION POISONS EVERYTHING (2007).

41. RICHARD DAWKINS, THE GOD DELUSION (2006).

42. This view is aptly summarized in the James Taylor song, "Sweet Baby James": "There's a song that they sing of their home in the sky / Maybe you can believe it if it helps you to sleep / But singing works just fine for me." JAMES TAYLOR, *Sweet Baby James*, *on* SWEET BABY JAMES (Warner Bros. Records 1990) (1970), *available at* http://www.lyricsfreak.com/j/james+taylor/sweet+baby+james_20069087.html.

Even in the Civil War, when opposing armies each had chaplains reassuring the troops that they were doing God's will,[43] it has never been thought that religion was just a private matter. It is relatively easy to find the kinds of statements from John Adams and Washington connecting religious belief to survival as a nation, but even in recent history religion was a driving force behind the civil rights movement,[44] and it appears that Americans take religion into account when they choose their elected representatives.[45] Mansfield predicts that "[t]he next presidential election promises to be a contest of religious worldviews as much as, if not more than, any other in American history."[46] Mansfield's prediction is subject to being proven wrong (and it is hard to imagine how one would rigorously test such a hypothesis), but it may also prove prophetic.

Mansfield is encouraged to note a number of legislative efforts that would help restore balance in our approach to the role of religion in public life. One initiative, House Bill 2679, the Public Expression of Religion Act, was passed by the House of Representatives in 2006.[47] It would prevent the fee-shifting provisions of 42 U.S.C. § 1988 from applying to cases involving the Establishment Clause. Another initiative, House Bill 235, the Houses of Worship Free Speech Restoration Act, would remove the threat of the loss of non-profit tax-deductible status on the part of churches when they address political issues, particularly the conduct of politicians when their policies encourage or conflict with a church's view of what God demands of the nation.[48] Since the time that Old Testament prophets warned about God's expectations and the consequences of disregarding them, religious leaders have claimed the right, indeed the obligation, to "speak truth to power." Although some religious leaders be-

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43. As Abraham Lincoln's Second Inaugural noted, with some bitter irony:

> Both read the same Bible and pray to the same God, and each invokes His aid against the other. It may seem strange that any men should dare to ask a just God's assistance in wringing their bread from the sweat of other men's faces, but let us judge not, that we be not judged. The prayers of both could not be answered. That of neither has been answered fully. The Almighty has His own purposes.

Abraham Lincoln, Second Inaugural Address (March 4, 1865).

44. CHARLES MARSH, GOD'S LONG SUMMER: STORIES OF FAITH AND CIVIL RIGHTS *passim* (Princeton University Press 1997); Barbara L. Bezdek, *To Attain "The Just Rewards of So Much Struggle": Local-Resident Equity Participation in Urban Revitalization*, 35 HOFSTRA L. REV. 37, 94 n.260 (2006) ("[T]he recurring potent grass-roots forces in popular movements for economic inclusion—justice under law—have been religious leaders and congregants."). For a recent example of the involvement of religious leaders in a political/legal struggle, see Reverend Nelson Johnson, *Reflections on an Attempt to Build "Authentic Community" in the Greensboro Kmart Labor Struggle*, 2 U. PA. J. LAB. & EMP. L. 675, 675 (2000).

45. Sam Harris, an author of one of the militantly atheist books, complained about a poll in which 90% of Americans said they would vote for an otherwise qualified candidate who was female, Jewish, or black, and 79% would vote for a gay candidate; however, only 37% of Americans would vote for an atheist candidate, otherwise qualified. Nicholas D. Kristof, *A Modest Proposal for a Truce on Religion*, N.Y. TIMES, December 3, 2006, § 4, at 13.

46. MANSFIELD, *supra* note 1, at 130.

47. The Public Expression of Religion Act, H.R. 2679, 109th Cong. § 2(b) (2005).

48. Houses of Worship Free Speech Restoration Act of 2005, H.R. 235, 109th Cong. § 1(a) (2005).

lieve that it is imprudent, indeed unbiblical, to make specific pronouncements about the wisdom of particular political practices, the judgment about what is morally required (as distinguished from politically wise) is essentially a theological judgment, and it should be no part of the government's jurisdiction to substitute its judgment for what topics the preacher should address. If a government bureaucracy (the Internal Revenue Service) is given the authority to withdraw significant benefits (the right to deduct contributions from one's taxes) because of complaints that the church "is too much involved in politics," we should recognize that religious liberty is seriously jeopardized. As Mansfield points out, this is bad not only for religion, but for government. If government is denied the unique perspective that religious traditions provide (and in light of the limited influence that religious leaders exert in comparison to other influences on the electorate), we are the poorer for it.

But that brings us back to the question which is bound to result from Mansfield's analysis. If the popular view of the First Amendment is wrong, and if our public discourse would benefit from correcting the misperception that religious expression somehow turns toxic in the public square, where will we find the boundary between appropriate and inappropriate interaction between government and religion? Should a state be able to establish a religion? Should it be able to provide nonpreferential support to all religions? Can a city deny Wiccans the right to worship? Mansfield is not a constitutional lawyer, and it is perhaps unfair to ask him to come up with a tidy and inclusive legal doctrine. It is of course permissible to imagine the solution our Founders adopted: Let individual states develop their own unique solutions to the problem. Given the protection of religious liberty in many state constitutions and our historical experience with a tradition of tolerance, we may be confident that, even if there were no federal constitutional doctrine prohibiting state interference with religious liberty, there is not much to worry about. Even if there were individual departures from what most Americans would favor, such departures might be permitted based on the principle that Louis Brandeis articulated: "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[49] On the other hand, perhaps some general protection might be found in the Fourteenth Amendment to the effect that if some state practice is so egregious that it violates "privileges and immunities of citizens,"[50] then a federal court has authority to prevent such abuse; but this power would be used sparingly rather than creating a cottage industry for litigation.

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49. New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *see* Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 VAND. L. REV. 1229, 1233 (1994).

50. U.S. CONST. amend. XIV, § 1.

This brings up the third of the solutions Mansfield reviews, a sort of "nuclear option" for religion clause cases. The appellate jurisdiction of the federal courts[51] is subject to being withdrawn, or selectively withdrawn (via the "exceptions" clause[52]) by Congress. Thus, at least in theory, Congress could declare that the Supreme Court had no jurisdiction to hear cases involving school prayer, or public displays of religious symbols. Ron Paul, a candidate in the 2008 Presidential campaign, has sponsored the We the People Act, House Bill 5739,[53] which would remove the jurisdiction of federal courts, including the Supreme Court, from "any claim involving the laws, regulations, or policies of any State or unit of local government relating to the free exercise or establishment of religion."[54] Mansfield is not wedded to any of the three proposals. He is confident that even if all of them fail, "others like them will surely arise. The sense in the nation that something has gone horribly wrong in matters of religion and government is too pronounced for the current status quo to remain much longer."[55] Given the fact that the *Everson* case has been around for sixty years, and similar measures in the past have come to naught, one might question Mansfield's confidence. But those who would view the measures as extreme ought not be complacent. If Mansfield is correct (as I believe he is) that today's Establishment Clause jurisprudence is based on a series of demonstrably false premises, and if he is also correct (as virtually everyone would concede, albeit for different reasons) that current "Establishment Clause jurisprudence" is an incoherent mess, then the prospect of significant, even dramatic, change becomes more plausible. The development of a persuasive alternative method for deciding Establishment Clause cases will make it much more likely that such change will occur. Twenty years ago I proposed a modified version of Philip Kurland's neutrality rule,[56] and I still would prefer

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51. The Supreme Court is given original jurisdiction over certain types of cases: those "affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party." U.S. CONST. art. III, § 2. However, virtually all the cases involving freedom of religion arise as a result of the exercise of *appellate* jurisdiction by the U.S. Supreme Court. Even the jurisdiction of the lower federal courts (what the Constitution refers to as "inferior courts"—trial courts and courts of appeal) is in the plenary control of Congress: "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts *as the Congress may from time to time ordain and establish.*" U.S. CONST. art. III, § 1 (emphasis added). Congress in theory could abolish federal trial and appellate courts, or authorize them for limited types of cases.

52. After describing the original jurisdiction of the Supreme Court, Article III, § 2 states, "In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, *with such exceptions*, and under such regulations as the Congress shall make." U.S. CONST. art. III, § 2 (emphasis added).

53. We the People Act, H.R. 5739, 109th Cong. § 3(1)(a) (2006). In the Senate an equivalent bill, S. 520, has been sponsored by Senator Shelby. The Constitution Restoration Act of 2005, S. 520, 109th Cong. § 101(a) (2005).

54. MANSFIELD, *supra* note 1, at 127.

55. *Id.* at 129.

56. DeWolf, *supra* note 6, at 254-59. In essence, I proposed that state action be judged according to whether it treated religion neutrally, permitting state aid to religion so long as it was available on a neutral basis regardless of viewpoint. I contrasted this standard with what I called the "affirmative action" model, prohibiting aid to religion wherever it was perceived that "too much" benefit was inuring to religion. I also proposed that a neutrality rule would allow "secular space" for

it to the current state of affairs and to virtually all of the substantive proposals that have been proposed to bring order out of the current chaos. But some ingenuity and political savvy will be required to identify the thread by which we may escape this labyrinth.

Mansfield concludes with an epilogue that invokes the history of the Berlin Wall. As Mansfield puts it, "there is another wall whose time has come to an end."[57] He is quick to point out that it is not the wall of separation *between the institutions* of church and state that needs to be torn down; rather, it is the wall "that is assumed to stand between all government and all religion."[58] Mansfield wants to return to the vision of the Founders, in which the nation "welcomes the riches of faith into the public sphere":

> This is the dream of a new generation and not because [its members] wish to religiously oppress their neighbors. Instead, they know that the secular State has been tried and found wanting in their time, and they wish for an age in which, as Dr. King dared to hope, religion once again becomes the conscience of the State.[59]

Mansfield draws upon the Berlin Wall metaphor for another reason. Not only was it an instrument of oppression, but it came down relatively suddenly. Even those who bitterly opposed it had reason to think it was more or less permanent. Its collapse also left a number of very difficult practical problems to resolve. The abandonment of our current approach to the First Amendment would also create practical difficulties, but a false sense of complacency or security may arise from thinking that such problems logically entail preservation of the status quo. Thus, Mansfield may be right in thinking that the future may be dramatically different from the past.

To summarize, Mansfield's aim in writing this book was to present the origin of the Establishment Clause (and the misused phrase "wall of separation between church and state") in a lively and persuasive way. In this he has succeeded. A previous book about George Bush sold over a million copies,[60] and Mansfield may get a similar audience for this book. Despite its cosmetic flaws, the book may serve as a catalyst, or at least reflects a larger cultural hunger, for the adoption of a more sensible approach to the relationship between religion and government in America.

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religion, including special zoning rules for churches, chaplains in the military, and accommodation for religious practice (like prayer) where it furthered the state's interests.

57. MANSFIELD, *supra* note 1, at 138.

58. *Id.*

59. *Id.* at 138-39.

60. STEPHEN MANSFIELD, THE FAITH OF GEORGE W. BUSH (2004).

(IM)BALANCE AND (UN)REASONABLENESS: HIGH-SPEED POLICE PURSUITS, THE FOURTH AMENDMENT, AND *SCOTT V. HARRIS*

INTRODUCTION

History teaches that suspects, on occasion, flee from police officers. While this principle has changed very little since the adoption of the Fourth Amendment in 1791, the appropriate response to a suspect's flight has changed very much. At the time of the founding, the law permitted officers to simply kill a fleeing felony suspect rather than allow him to escape;[1] two centuries later, an officer who uses deadly force against a fleeing suspect may be liable in constitutional tort.[2]

The United States Supreme Court's decision in *Scott v. Harris*[3] is the latest in a line of cases that seek to construct a framework for determining when an officer's use of force becomes unreasonable under the Fourth Amendment.[4] But *Scott*, unlike the Court's prior decisions on the constitutionality of excessive or deadly force, addressed a thoroughly modern phenomenon: the high-speed pursuit. In an 8-1 decision, the Court held that an officer may terminate a high-speed pursuit even if doing so entails great risk to the fleeing suspect.[5]

The analysis in *Scott*, however, is problematic. Although the majority followed the Court's Fourth Amendment precedents by applying a balancing test to determine the reasonableness of using deadly force to terminate a high speed pursuit,[6] the majority's characterization of the facts tilted the metaphorical balance in favor of deadly force. This tilting occurred from the majority's reliance on two questionable factual premises.

First, to determine the facts of the case, the majority viewed a videotape of the pursuit shot from dash-mounted cameras on the patrol cars.[7] Although the Northern District of Georgia, the Eleventh Circuit, and Justice Stevens concluded that jurors could have watched the videotape and determined that the officer's use of deadly force was unreason-

1. *See* Tennessee v. Garner, 471 U.S. 1, 12 (1985) (discussing the history of the common law rule).

2. *See* Michael M. Rosen, *A Qualified Defense: In Support of the Doctrine of Qualified Immunity in Excessive Force Cases, With Some Suggestions for its Improvement*, 35 GOLDEN GATE L. REV. 139, 141-43 (2005).

3. 127 S. Ct. 1769 (2007).

4. *See Garner*, 471 U.S. 1; Graham v. Connor, 490 U.S. 386 (1989).

5. *Scott*, 127 S. Ct. at 1779.

6. *Id.* at 1778.

7. *Id.* at 1775.

able, the majority held otherwise: it found that the suspect's driving was so obviously dangerous that no reasonable jury could disagree.[8] But the substantial differences in interpretation of the videotape voiced in the opinions of Justice Stevens and the Eleventh Circuit suggest that a reasonable jury could indeed disagree with the majority.

In light of the potential for multiple reasonable interpretations of the videotape, the majority relied too heavily on its own interpretation of the videotape to determine the "facts" in *Scott*. By ignoring others' interpretations of the videotape, the majority tilted the balancing test in favor of deadly force. The majority's tilting of the balance may make future uses of deadly force in high-speed pursuits more likely to be found reasonable, and the majority's rationale for its interpretation of the videotape seems to undercut well-established summary judgment standards, thereby giving judges greater interpretational leeway at the summary judgment stage.

Second, in deciding the reasonableness of the officer's use of deadly force to terminate the high-speed pursuit, the majority assumed that the officer had two options at his disposal: complete cessation of the pursuit or deadly force.[9] In reality, however, more than two options existed. An understanding of pursuit psychology, a restrictive pursuit policy, the use of devices such as "stopsticks," the photographing of the suspect's license plate number for apprehension at a later time, and a final loudspeaker warning were all viable, realistic, and available alternatives to deadly force.

By ignoring these alternatives, the majority created an artificial dichotomy of complete cessation or deadly force that did not fully represent reality. Because it did not factor in the efficacy of alternatives, this artificial dichotomy tended to make deadly force appear more reasonable than it perhaps was. By setting a precedent that relied on this artificial dichotomy, *Scott* created the risk that lower courts may not look at all of an officer's available options to terminate future high-speed pursuits, and also may have inadvertently discouraged law enforcement agencies from adopting these alternatives to deadly force.

Part I of this comment discusses the legal background of deadly force and Fourth Amendment reasonableness. Part II summarizes the Court's decision in *Scott*. Part III argues that, although *Scott* followed Fourth Amendment precedents in principle, the majority's application of those precedents, in practice, rested upon questionable factual premises stemming from the majority's interpretation of the videotape, and the majority's refusal to account for alternative methods of ending high-speed pursuits. Part IV concludes this comment.

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8. *Id.* at 1775-76.
9. *Id.* at 1778.

I. BACKGROUND[10]

The Fourth Amendment provides citizens with a constitutional right against unreasonable seizures by the government.[11] At the time of the founding, officers were entitled to use deadly force to prevent a fleeing felon's escape.[12] Although most American jurisdictions discouraged it, the option of using deadly force to stop a fleeing felon remained available well into the twentieth century.[13] In *Tennessee v. Garner*,[14] however, the Court held that this common law rule violated the Fourth Amendment.[15] The Court expanded *Garner*'s holding in *Graham v. Connor*[16] to encompass excessive force under the Fourth Amendment, as well.[17] After *Garner* and *Graham*, therefore, the Fourth Amendment's reasonableness standard governed the propriety of an officer's use of excessive or deadly force. The doctrines developed in both *Garner* and *Graham* are crucial to the Court's Fourth Amendment analysis in *Scott*.

In *Garner*, the Court held that an officer who shot an unarmed fleeing suspect in the back of the head in order to prevent his escape violated the suspect's right against unreasonable seizure.[18] The Court came to this conclusion by balancing the "nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion."[19] Because the suspect's interest in his own life outweighed the state's interest in capturing him, the Court found that the officer acted unreasonably.[20]

Although the Court held that deadly force "may not be used unless it is necessary to prevent the [suspect's] escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others,"[21] it also emphasized

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10. The Court granted certiorari to *Scott* as an interlocutory appeal from summary judgment against the officer's defense of qualified immunity. *Id.* at 1773-74. The first step in a qualified immunity analysis asks whether an officer violated a claimant's constitutional rights. Saucier v. Katz, 533 U.S. 194, 201 (2001). *See generally* Karen Blum, *Qualified Immunity in the Fourth Amendment: A Practical Application of § 1983 as it Applies to Fourth Amendment Excessive Force Cases*, 21 TOURO L. REV. 571, 576-80 (2005). Although *Scott* came to the Court as a qualified immunity case, *Scott*'s analysis deals only with the first step of the analysis. 127 S. Ct. at 1774, 1776. Because qualified immunity is only tangentially related to the scope of this comment, it will be dealt with only when necessary to address the Fourth Amendment issues.

11. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

12. 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.1(d), at 38 (4th ed. 2004); *see also* Tennessee v. Garner, 471 U.S. 1, 12-16 (1985).

13. 3 LAFAVE, *supra* note 12, § 5.1(d), at 38.

14. 471 U.S. 1 (1985).

15. *Garner*, 471 U.S. at 10.

16. 490 U.S. 386 (1989).

17. *Id.* at 388.

18. *Garner*, 471 U.S. at 3-4.

19. *Id.* at 8 (quoting United States v. Place, 462 U.S. 696, 703 (1983) (internal quotations omitted)).

20. *Id.* at 9-10.

21. *Id.* at 3.

that *Garner*'s balancing test was fact-driven: an officer's "reasonableness depends on not only when a seizure is made, but also how it is carried out."[22] Furthermore, the Court looked to "whether the totality of the circumstances justified a particular sort of . . . seizure."[23] In sum, *Garner* stood for the proposition that the state's interest in deadly force must be balanced against the suspect's interest in his life in order to determine reasonableness under the Fourth Amendment.

Despite the Court's framing of *Garner* as a Fourth Amendment issue, there remained confusion in the decisions as to whether excessive force claims should be analyzed under the Fourth Amendment's reasonableness standard, or the Fourteenth Amendment's substantive due process approach.[24] In *Graham*, the Court held that "*all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard . . . ."[25] This holding not only reaffirmed the balancing test laid out in *Garner*, but added "objective reasonableness" to the analysis.[26]

Objective reasonableness asks "whether a reasonable police officer in the same circumstances would have used such force."[27] The Court set out factors to assist in determining objective reasonableness, including the severity of the crime, the immediacy of the threat, the suspect's resistance, and the potential for evasion.[28] In applying these factors, however, the Court recognized that "officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."[29] The trier of fact, therefore, must determine the "'reasonableness' of a particular use of force . . . from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[30]

After *Garner* and *Graham*, therefore, courts determined the Fourth Amendment reasonableness of excessive or deadly force by balancing the suspect's interest in his Fourth Amendment rights against the government's interest in the intrusion. If the government's interest in the intrusion could be deemed objectively reasonable under the circumstances, then its intrusion on the suspect's Fourth Amendment rights would, on a metaphorical balance, be deemed to outweigh the suspect's

22. *Id.* at 8.
23. *Id.* at 8-9.
24. Graham v. Connor, 490 U.S. 386, 393 (1989); *see also* 2 WILLIAM E. RINGEL, SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS § 22:17, at 48.1 (2d ed. 2007).
25. *Graham*, 490 U.S. at 395.
26. *Id.* at 396-97.
27. 2 RINGEL, *supra* note 24, § 22:17, at 46.
28. *Graham*, 490 U.S. at 396-97.
29. *Id.* at 397.
30. *Id.* at 396.

interest in his Fourth Amendment rights. The government's intrusion would, in short, be reasonable. It is this framework that the majority used in analyzing the Fourth Amendment question in *Scott*.

II. *SCOTT V. HARRIS*

A. Facts

Around 11 o'clock on a Thursday night in 2001, a Coweta County, Georgia, sheriff's deputy clocked Victor Harris's vehicle traveling 73 miles per hour in a 55 mile-per-hour zone.[31] The deputy activated his lights and siren and pursued Harris, but Harris refused to stop.[32] Harris then led the deputy on a high-speed pursuit down a rural two-lane highway.[33]

Although the pursuit began on an open highway, Harris soon entered Peachtree City, Georgia, and pulled into the parking lot of a shopping center.[34] By this time, more officers had responded to the pursuit and attempted to block the exits from the parking lot with their vehicles.[35] One of these officers was Deputy Timothy Scott.[36] The shopping center was closed for the evening, and the parking lot was empty except for Harris and the officers.[37] It appeared that Harris had decided to surrender, but he suddenly began driving toward the exit of the parking lot and collided with Deputy Scott's patrol car as he headed back onto the highway.[38] After this collision, Deputy Scott took over as the lead police vehicle in the pursuit.[39]

Because they were not informed of the underlying reason for the pursuit, the Peachtree City police did not directly participate in pursuing Harris.[40] The Peachtree City police did, however, block intersections along the pursuit route to ensure that cross-traffic would not travel into Harris's path.[41] Despite the lessened risk to innocent motorists due to these roadblocks, Deputy Scott radioed his supervisor for permission to "take [Harris] out" through a Precision Intervention Technique (PIT) maneuver.[42] Deputy Scott believed, however, that the vehicles were

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31. Harris v. Coweta County, No. 01-CV-148, slip op. at 1 (N.D. Ga. Sept. 25, 2003) (denying summary judgment in part), *rev'd in part*, 433 F.3d 807 (11th Cir. 2007), *rev'd sub nom.* Scott v. Harris, 127 S. Ct. 1769 (2007).

32. *Scott*, 127 S. Ct. at 1772.

33. *Id.*

34. *Harris*, No. 01-CV-148, slip op. at 1.

35. *Id.*

36. *Id.*

37. Brief of Plaintiff/Appellee Victor Harris at 12-13, Harris v. Coweta County, 433 F.3d 807 (11th Cir. 2005) (No. 03-15094).

38. *Harris*, No. 01-CV-148, slip op. at 1.

39. *Id.* at 2.

40. Brief of Plaintiff/Appellee Victor Harris, *supra* note 37, at 13.

41. *Harris*, No. 01-CV-148, slip op. at 1.

42. Harris v. Coweta County, 433 F.3d 807, 811 (11th Cir. 2005), *rev'd sub nom.* Scott v. Harris, 127 S. Ct. 1769 (2007). To execute a PIT maneuver, an officer pulls his squad car alongside

traveling too fast to safely execute the PIT maneuver and, instead, rammed Harris's vehicle from behind with the push bar of his squad car.[43] The collision sent Harris's vehicle careening off the road and down an embankment.[44] The crash, although effectively ending the pursuit, left Harris a quadriplegic at 19 years old.[45]

B. Procedural History

Harris filed suit under 42 U.S.C. § 1983, which provides a civil cause of action against those who, under color of law, deprive a citizen of his constitutional rights.[46] Harris alleged that Deputy Scott, through excessive force, violated his Fourth Amendment right against unreasonable seizure.[47] Deputy Scott moved for summary judgment on the basis of qualified immunity,[48] but the Northern District of Georgia denied his motion, finding sufficient disagreement over issues of material fact to "warrant submission to a jury."[49]

On interlocutory appeal, the Eleventh Circuit affirmed the Northern District of Georgia, holding that a reasonable jury could find that Deputy Scott violated Harris's Fourth Amendment right against unreasonable seizure.[50] Deputy Scott appealed from this judgment, and the Supreme Court granted certiorari.[51]

C. Majority Opinion

The Supreme Court majority held that "[a] police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death."[52]

Because *Scott* came to the Court on interlocutory appeal from summary judgment, there had been no factual findings by either judge or jury.[53] The Court therefore reviewed the record de novo.[54] Although the

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the fleeing vehicle and collides with its rear quarter panel. *Id.* at 810. The force of the collision causes the fleeing vehicle to spin out and typically brings it to a stop. *Id.*

43. Scott v. Harris, 127 S. Ct. at 1773.
44. *Id.*
45. *Id.* at 1785 (Stevens, J., dissenting).
46. 42 U.S.C. § 1983 (2006).
47. *Scott*, 127 S. Ct. at 1773.
48. *See* discussion of qualified immunity *supra* note 10.
49. *Scott*, 127 S. Ct. at 1773.
50. *Id.* at 1773-74.
51. *Id.* at 1774.
52. *Id.* at 1779.
53. *Id.* at 1774.
54. *Id.* at 1774-75. Though the majority did not specifically label its review de novo, its independent reexamination of the facts and law for the purpose of summary judgment suggests that standard. *See* 1 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 5-02, at 5-10 to -11 (3d ed. 1999) ("[W]hile the language of *material fact* often is thought of as the 'standard of review' for summary judgments, it is more precisely the actual, substantive test applied by all courts. The appellate review standard is de novo . . . since the sufficiency issue is a question of law.").

majority recognized that courts are usually "required to view the facts and draw reasonable inferences 'in the light most favorable to the party opposing the [summary judgment] motion,'"[55] the majority found that, in this case, a videotape showing the entire chase "so utterly discredited" Harris's version of the facts that "no reasonable jury could have believed him."[56] Accordingly, the majority held, no genuine factual dispute existed.[57]

Having absolved itself of a need to rely on a jury to determine the facts, the majority decided the reasonableness of Deputy Scott's actions as a "pure question of law."[58] Though the majority found it "clear from the videotape that [Harris] posed an actual and imminent threat" to bystanders, it also found it "clear that Scott's actions posed a high likelihood of serious injury or death to [Harris] . . . ."[59] Despite the fact that the likelihood of injury to Harris as a result of the seizure was probably greater than the likelihood of Harris's injuring bystanders, the majority found that Harris's culpability put on him—rather than innocent bystanders—the onus of injury.[60] After balancing the risk of injury to Harris against Deputy Scott's interest in protecting the public, the majority concluded that Deputy Scott was reasonable in pushing Harris's car off the road.[61]

Harris, however, argued that Deputy Scott's action was in fact unreasonable.[62] Harris first tried to analogize his case to *Garner*, arguing that Deputy Scott's action was "*per se* unreasonable" because it did not meet *Garner*'s preconditions for the use of deadly force.[63] Harris argued that *Garner* required that the suspect pose a threat of immediate harm to officers or others, that the suspect would have escaped but for the use of deadly force, and that the officer must have given the suspect some warning before using deadly force.[64] Although the majority tacitly admitted that these preconditions were not met, it nevertheless dismissed Harris's argument on the basis of *Garner*'s "vastly different facts."[65] The suspect in *Garner* was unarmed, on foot, and could not have reasonably been considered a threat, the Court noted.[66] Such facts were not

55. *Scott*, 127 S. Ct. at 1774.
56. *Id.* at 1776.
57. *Id.* (explaining that on a motion for summary judgment, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment").
58. *Id.* at 1776 n.8.
59. *Id.* at 1778.
60. *Id.*
61. *Id.*
62. *Id.* at 1777-78.
63. *Id.* at 1777; *see* discussion of *Garner supra* p. 465.
64. *Scott*, 127 S. Ct. at 1777.
65. *Id.*
66. *Id.*

"even remotely comparable to the extreme danger to human life posed by [Harris] in this case."[67]

Harris next claimed that had the police simply ceased their pursuit, Harris would have stopped driving recklessly and the public would have thus been protected without the use of deadly force.[68] The majority rejected this argument outright, noting that while ramming Harris's car off of the road "was *certain* to eliminate the risk that [Harris] posed to the public, ceasing pursuit was not."[69] The majority pointed out that if the police had ceased their pursuit, there was no way to know whether Harris would continue driving recklessly or not.[70]

D. Concurring Opinions

Justice Breyer and Justice Ginsburg each offered concurring opinions. Justice Breyer noted that he disagreed with the majority's articulation of a per se rule of Fourth Amendment reasonableness.[71] Calling *Scott*'s rule "too absolute" for a Fourth Amendment analysis, Justice Breyer argued that determining "whether a high-speed chase violates the Fourth Amendment may well depend upon more circumstances than the majority's rule reflects."[72]

Taking quite an opposite stance, Justice Ginsburg, whose short concurrence largely responded to Justice Breyer's criticisms, pointed out that *Scott*'s rule was not as mechanical or per se as Justice Breyer's concurrence suggested.[73] Rather, she argued that *Scott*'s inquiry and subsequent rule were "situation specific."[74] Justice Ginsburg listed the risk to "lives and well-being of others," and the possibility of a safer way of stopping the fleeing vehicle as "relevant considerations" underlying the rule.[75]

E. Dissenting Opinion

In the lone dissent, Justice Stevens chastised the majority for its reliance on the videotape, its speculation over Harris's behavior, and its setting what he perceived to be an inflexible rule. Justice Stevens first cast doubt on the majority's belief that the events on the videotape "blatantly contradicted" the factual determinations of the Eleventh Circuit and the Northern District of Georgia.[76] Contrary to the majority, Justice Stevens argued that "the only innocent bystanders" placed at risk were

67. *Id.*
68. *See id.* at 1778.
69. *Id.* at 1778-79.
70. *Id.* at 1779.
71. *Id.* at 1781 (Breyer, J., concurring).
72. *Id.* (Breyer, J., concurring).
73. *Id.* at 1779 (Ginsburg, J., concurring).
74. *Id.* (Ginsburg, J., concurring).
75. *Id.*
76. *Id.* at 1781 (Stevens, J., dissenting).

"the drivers who either pulled off the road in response to the sirens or passed [Harris] in the opposite direction when he was driving on his side of the road."[77] Justice Stevens next addressed Harris's argument—rejected by the majority—that the police could have simply ceased pursuit and arrested Harris later.[78] The majority, Justice Stevens contended, had no evidentiary basis for believing that a cessation of pursuit would not have led to a change in Harris's driving—it simply used the videotape to replace "the rule of law with its ad hoc judgment."[79] Finally, Justice Stevens criticized the majority for ignoring past precedent and setting faulty future precedent.[80] Justice Stevens argued that *Garner* "set a threshold" for the reasonableness of deadly force, and that the reasonableness question should go to a jury.[81] The majority's rule, he concluded, "[flies] in the face of the flexible and case-by-case 'reasonableness' approach" of *Garner* and *Graham*: the reasonableness of the decision should be left up to jurors in Georgia—not justices in Washington.[82]

III. ANALYSIS

The majority, following *Garner* and *Graham*, relied on a balancing test to decide the Fourth Amendment issue in *Scott*.[83] Although the majority did not include the phrase "balancing test" in its holding, it nevertheless considered "the risk of bodily harm that Scott's actions posed to [Harris] in light of the threat to the public that Scott was trying to eliminate."[84] The majority's analysis balanced Deputy Scott's interest in "ensuring public safety" with the "high likelihood of serious injury or death" to Harris and concluded that Deputy Scott reasonably used deadly force.[85] But it is not the majority's application of the balancing test, in and of itself, that makes the decision in *Scott* problematic; rather, it is the "facts" that the majority applied the balancing test to. This comment argues that the majority tilted the balance toward deadly force by relying on questionable factual premises stemming from the majority's singular interpretation of the videotape, and the majority's refusal to consider available alternatives to deadly force.

A. Interpretation of the Videotape

To determine the threat that Harris's flight posed to the public, and to thus analyze whether Deputy Scott reasonably used deadly force against Harris, the majority relied on a videotape of the pursuit from

77. *Id.* at 1783.
78. *Id.*
79. *Id.* at 1784.
80. *Id.* at 1784-85.
81. *Id.* at 1784.
82. *Id.* at 1785.
83. *Id.* at 1778.
84. *Id.*
85. *Id.*

Deputy Scott's dash-mounted camera.[86] Although Justice Scalia quaintly referred to the videotape as an "added wrinkle" to the Court's usual adoption of the nonmoving party's version of the facts when determining the appropriateness of summary judgment,[87] in the context of *Scott*, the videotape proved to be substantially more than a wrinkle. Indeed, because the majority relied on its interpretation of the videotape to determine the "facts," the videotape—and the majority's interpretation of it—affected the entire outcome of the case.

The majority's reliance on its interpretation of the videotape is questionable, however, in light of the differing interpretations of the videotape discussed in opinions by Justice Stevens and the Eleventh Circuit.[88] Despite the interpretations of these presumably reasonable judges, the majority refused to acknowledge the validity of any interpretation contrary to its own. Although the majority indeed analyzed the "facts" in *Scott* using the balancing test laid out in *Garner* and *Graham*, its insistence that the videotape could be interpreted in only one way tilted the metaphorical balance in favor of deadly force. This tilting is not only apt to make deadly force in the context of high-speed pursuits more likely to be adjudged reasonable, but it threatens to undercut well-established summary judgment standards by giving judges greater interpretational leeway at the summary judgment stage.

It is well established that summary judgment requires courts to view the facts in the light most favorable to the nonmoving party.[89] Only if "no genuine issue as to any material fact" exists will the moving party be granted summary judgment.[90] Applying this standard and viewing the facts in the light most favorable to Harris, the Eleventh Circuit concluded

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86. The use of videotape in the courtroom is a relatively common occurrence. Karen Martin Campbell, Note, *Roll Tape—Admissibility of Video-Tape Evidence in the Courtroom*, 26 U. MEM. L. REV. 1445, 1451-52 (1996). Its use in a United States Supreme Court decision, however, is somewhat rare: the Court has viewed videotape evidence in only a handful of cases. *See, e.g.*, Saucier v. Katz, 533 U.S. 194, 212 (2001) (Ginsburg, J., concurring) (finding that videotape suggested officer not solely responsible for alleged excessive force); United States v. Playboy Entm't Group, 529 U.S. 803, 812 (2000) (noting that videotape examples of signal bleed of pornographic programming showed salaciousness and snow); Koon v. United States, 518 U.S. 81, 86-87 (1996), *superseded by statute*, Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, PUB. L. NO. 108-21, 401(d)(1), 117 Stat. 670, *as recognized in* Rita v. United States, 127 S. Ct. 2456, 2472 (2007) (describing videotaped events of LAPD's beating of Rodney King); Madsen v. Women's Health Ctr., 512 U.S. 753, 785-90 (1994) (Scalia, J., concurring in part and dissenting in part) (describing videotape of protest at issue in the case); Pennsylvania v. Muniz, 496 U.S. 582, 586 (1990) (determining which portions of defendant's post-DUI arrest videotape should be excluded for lack of *Miranda* warning); Estes v. Texas, 381 U.S. 532, 536-37 (1965) (finding that videotape of the media frenzy at defendant's trial supported defendant's contention of due process deprivation).

87. *Scott*, 127 S. Ct. at 1775.

88. *See id.* at 1781-85 (Stevens, J., dissenting); *see* Harris v. Coweta County, 433 F.3d 807, 815-17 (11th Cir. 2005).

89. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) ("On summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.").

90. FED. R. CIV. P. 56(c).

that a reasonable jury could believe Harris's version of the facts.[91] The Supreme Court majority, however, after viewing the videotape, concluded that no reasonable jury could believe Harris's version of the facts: "[f]acts must be viewed in the light most favorable to the nonmoving party," it wrote, "only if there is a 'genuine' dispute as to those facts."[92] If a party's version of the events is "so utterly discredited by the record that no reasonable jury could have believed" it, then "a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."[93]

At first blush, the majority's position appears sensible. Surely a plaintiff whose version of the facts misrepresents what actually happened should not be given the benefit of the doubt in the face of videotape evidence. Furthermore, ignoring a videotape of the actual events and relying solely on the pleadings would seem anachronistic in the ubër-tech environment of the twenty-first century. Indeed, one commentator notes that plaintiffs sometimes "allege sufficiently egregious facts in order to clear the summary judgment hurdle" and thereby circumvent the qualified immunity privilege altogether—whether deservedly or not.[94] But the decision in *Scott*, based as it was on the majority's interpretation of the videotape, which happened to be quite different from those of Justice Stevens and the Eleventh Circuit, begs the question of whose interpretation of the videotape better predicted the inclinations of a reasonable jury.

Only by watching the videotape—as Justice Breyer invited "interested reader[s]" to do via a link on the Court's website[95]—can one get a sense of the disagreement among the majority, Justice Stevens, and the Eleventh Circuit. Shot in low-resolution black-and-white, with the police officers' radio traffic barely discernible even when played at high volume, the videotape depicts the chase from two different police vehicles: the first deputy's (who clocked Harris's speeding), and then Deputy Scott's, including the push from behind.[96] The Eleventh Circuit described the events almost nonchalantly, emphasizing the positive aspects of Harris's driving:[97]

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91. *Harris*, 433 F.3d at 810, 814.
92. *Scott*, 127 S. Ct. at 1776.
93. *Id.*
94. Rosen, *supra* note 2, at 152.
95. *Scott*, 127 S. Ct. at 1780 (Breyer, J., concurring).
96. Videotape, Scott v. Harris, 127 S. Ct. 1769 (2007) (No. 05-1631), *available at* http://www.supremecourtus.gov/opinions/video/scott_v_harris.rmvb.
97. Nowhere in its opinion does the Eleventh Circuit confirm that it actually watched the videotape. Harris v. Coweta County, 433 F.3d 807 (11th Cir. 2005), *rev'd*, 127 S. Ct. 1769 (2007). However, the parties' briefs cite the videotape repeatedly, which indicates its presence in the appellate record. *See* Brief of Defendants-Appellants Mark Fenniger & Timothy Scott at 5-10, Harris v. Coweta County, 433 F.3d 807 (11th Cir. 2005) (No. 03-15094); Brief of Plaintiff/Appellee Victor Harris at 10-19, *Harris*, 433 F.3d 807 (No. 03-15094); Reply Brief of Defendants-Appellants Mark

> Harris remained in control of his vehicle, slowed for turns and intersections, and typically used his indicators for turns. He did not run any motorists off the road. . . . Nor was he a threat to pedestrians in the shopping center parking lot, which was free from pedestrian and vehicular traffic as the center was closed. Significantly, by the time the parties were back on the highway and Scott rammed Harris, the motorway had been cleared of motorists and pedestrians allegedly because of police blockades of the nearby intersections.[98]

The majority described the same events quite differently, portraying Harris as a madman set loose on the Georgia highway system:

> [W]e see respondent's vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit. We see it run multiple red lights and travel for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous maneuvers just to keep up.[99]

Oddly, both the Eleventh Circuit's version of the chase and the majority's version are plausible, if not accurate, when compared with the videotape. Harris did seem to be in control of his vehicle, yet there is no doubt that he was traveling at very high speeds.[100] Harris also signaled before making turns, but then wildly crossed the double-yellow-line numerous times to pass motorists.[101] And while the highway had been cleared of most of the traffic due to roadblocks, there is no doubt that the police officers pursuing Harris had to drive unsafely in order to keep up with him.[102] These interpretive differences suggest that a greater factual dispute existed than the majority cared to admit. Justice Stevens incisively commented, "[i]f two groups of judges can disagree so vehemently about the nature of the pursuit and the circumstances surrounding the pursuit, it seems eminently likely that a reasonable juror could disagree with this Court's characterization of events."[103] This observation appears warranted after watching the videotape and comparing the respective interpretations of the Eleventh Circuit and the majority.

Indeed, the majority's interpretation of the videotape has not gone without criticism. In an excoriating editorial, Jessica Silbey noted that the majority "disregarded all other evidence and anointed the film ver-

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Fenniger and Timothy Scott at 1-3, *Harris*, 433 F.3d 807 (No. 03-15094). It seems to be a safe assumption, therefore, that the Eleventh Circuit watched the videotape to inform its decision.

98. *Harris*, 433 F.3d at 815-16 (citations omitted).

99. *Scott*, 127 S. Ct. at 1775.

100. Videotape, *supra* note 96.

101. *Id.*

102. *Id.*

103. *Scott*, 127 S. Ct. at 1785 (Stevens, J., dissenting).

sion of the disputed events as the truth."[104] Professor Silbey argued that the majority's failure

> to recognize how all film manifests a distinct point of view (and not others) and how it is inevitably framed (by the size of the camera and the length of the film) to exclude what other witnesses to the event would have seen is a grave error on the part of a fact-finder—or a film critic. Films never speak for themselves; they require interpretation.[105]

Professor Silbey is not alone in believing that videotape evidence requires a more critical view than the majority seemed to give it in *Scott*. A federal appellate judge, after interpreting the events of a videotaped high-speed pursuit differently than his colleagues, argued in concurrence that jurors and not judges "ought to be deciding whether the risk posed by the fleeing suspect is too minimal, or the suspected crime too minor, to make killing [the suspect] a reasonable way to halt the chase."[106] When considered alongside Justice Stevens's skepticism about the dangerousness of the events on the videotape, and alongside the Eleventh Circuit's interpretation of the videotape, the majority's interpretation of the videotape is questionable. As Professor Silbey summarizes, films always require interpretation: what is left out of the film may be just as important as what is in it.[107] By treating its own interpretation of the videotape as indisputable fact the majority, much like a Faulknerian narrator, faithfully related what it perceived but nevertheless missed the big picture.

Although it did go on to analyze with a balancing test the "facts" it culled from the videotape, the undue weight the majority gave to its interpretation of the videotape tilted the balance in favor of deadly force. The majority weighed "the risk of bodily harm that Scott's actions posed to [Harris] in light of the threat to the public that Scott was trying to eliminate."[108] Conceptually, then, there were two "sides" to this metaphorical balance: Harris's "risk of bodily harm" on the one side, and the "threat to the public" on the other. The majority's interpretation of the videotape—finding Harris's driving indisputably dangerous—added weight to the "threat to the public" side of the balance. Although factoring in Justice Stevens's and the Eleventh Circuit's interpretation of the videotape—finding Harris's driving only debatably dangerous—would have subtracted weight from the "threat to the public" side of the balance, the majority declined to consider it. By ignoring Justice Stevens's and the Eleventh Circuit's interpretations of the videotape, the majority

104. Jessica Silbey, Op-Ed., *Justices Taken in by Illusion of Film*, BALT. SUN, May 13, 2007, at 21A.
105. *Id.*
106. Beshers v. Harrison, 495 F.3d 1260, 1272 (11th Cir. 2007) (Presnell, J., concurring).
107. Silbey, *supra* note 104.
108. *Scott*, 127 S. Ct. at 1778.

transmogrified its own interpretation into objective truth and thus weighted the "threat to the public" side of the balance to reflect a greater threat than perhaps existed in reality. This greater threat, in turn, urged a greater necessity for the use of deadly force.

Naturally, *Scott*'s tilted balance will have some effect on future cases dealing with the use of deadly force in high-speed pursuits. In applying *Scott* to these future cases, courts may have to account for not only the objective reasonableness factors of *Graham*,[109] but the majority's interpretation of the videotape in *Scott*. Future high-speed pursuits may, at the very least, be compared with the *Scott* videotape and the majority's pronouncements of Harris's indisputable dangerousness. If the future high-speed pursuit is not less threatening to the public than the pursuit in *Scott* (and the majority's interpretation of that threat), the use of deadly force against the fleeing suspect would be, at least in theory, almost per se reasonable.[110]

But *Scott*'s analysis of the videotape will likely reach further than high-speed pursuit cases. The majority's implication that judges can interpret videotapes as well as (or better than) jurors seems likely to entrust judges with greater interpretational authority at the summary judgment stage. In the Fourth Amendment context, this has the potential to put the disposition of excessive or deadly force claims much more squarely into the hands of judges.[111]

Although the Eleventh Circuit, following well-established summary judgment standards,[112] viewed the videotape in the light most favorable to Harris, the Supreme Court majority took issue with those standards.[113] Using language bordering on the hyperbolic—characterizing Harris's version of events as "blatantly contradicted" by the videotape, "utterly discredited by the record," and "visible fiction"—the majority declared

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109. *See* discussion of *Graham supra* p. 466.

110. Both Justice Breyer and Justice Stevens complained that *Scott* set an inflexible, "per se" rule, at odds with the fact-driven inquiries normally used in Fourth Amendment cases. *Scott*, 127 S. Ct. at 1781 (Breyer, J., concurring); *id.* at 1785 (Stevens, J., dissenting). Some lower court opinions have expressed this concern as well. *See Beshers*, 495 F.3d at 1272 (Presnell, J., concurring) ("For all of its talk of a balancing test, the *Harris* court has, in effect, established a *per se* rule: Unless the chase occurs below the speed limit on a deserted highway, the use of deadly force to end a motor vehicle pursuit is always a reasonable seizure.").

111. *Cf.* Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229 (2006). Professor Chen argues that the Court has a pattern of ignoring the importance of factual disputes in qualified immunity claims, treating reasonableness as a "pure legal analysis because of its desire that judges, rather than juries, resolve such claims." *Id.* at 232. "The Court's characterization of qualified immunity as a question of law," Professor Chen contends, "is not driven by analytical factors ordinarily applied to the law/fact distinction, but by its purely functional decision to allocate all decision making concerning qualified immunity to judges." *Id.* at 264. Professor Chen concludes that the Court "has shed the doctrine of adherence to conventional understandings of summary judgment procedure, cavalierly dismissing its strict and detailed requirements for adjudicating factual issues prior to trial." *Id.* at 277.

112. Harris v. Coweta County, 433 F.3d 807, 810 (11th Cir. 2005), *rev'd*, 127 S. Ct. 1769.

113. *Scott*, 127 S. Ct. at 1776.

that the Eleventh Circuit "should have viewed the facts in the light depicted by the videotape."[114] This declaration assumes, as the majority did in *Scott*, that there is only one reasonable interpretation of a videotape.[115] This assumption of interpretational uniformity suggests that *Scott* will provide all judges a similar power to unquestionably rely on their subjective interpretations of videotapes at the summary judgment stage.

By declaring Justice Stevens's and the Eleventh Circuit's interpretations of the videotape an impossibility, and relying instead on its own interpretation, the majority might have added another hurdle to getting excessive and deadly force claims past summary judgment: the alleged Fourth Amendment violation must be so egregious that it is unquestionable. Close cases—like *Scott*—may now be disposed on summary judgment because courts are apparently not obligated to view the facts in light of the nonmoving party if the judge believes that the record does not warrant this kind of treatment. A number of courts have already applied this rule.[116] As demonstrated by the differing interpretations of the videotape in *Scott*, a "genuine" factual dispute is something quite different depending on whose opinion one relies on. Post-*Scott* summary judgment standards, allowing a subjective determination of "genuine," may turn out to be somewhat less restrained than the majority would have anticipated.

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114. *Id.*

115. *Id.* at 1775, n.5. During oral argument, several justices shared their interpretations of the videotape: "He created the scariest chase I ever saw since 'The French Connection,'" exclaimed Justice Scalia. Transcript of Oral Argument at 24, *Scott*, 127 S. Ct. 1769 (No. 05-1631). Justice Alito pointed out that he "looked at the videotape on this" and thought that Harris "created a tremendous risk of [sic] drivers on that road." *Id.* Justice Ginsburg commented that Harris clearly endangered the lives and safety of others: "Anyone who has watched that tape has got to come to that conclusion, looking at the road and the way that this car was swerving, and the cars coming in the opposite direction. This was a situation fraught with danger." *Id.* at 36. Justice Breyer questioned the Eleventh Circuit's interpretation of the videotape, asking: "But suppose I look at the tape and I end up with Chico Marx's old question with respect to the Court of Appeals: Who do you believe, me or your own eyes?" *Id.* at 49.

116. *See, e.g.*, Beshers v. Harrison, 495 F.3d 1260, 1262 (11th Cir. 2007) (Presnell, J., concurring) ("[I]n this case, as in [*Scott*], we have the benefit of viewing two videotapes from the patrol cars involved in the pursuit. Thus, to the extent Appellant's version of the facts is clearly contradicted by the videotapes, such that no reasonable jury could believe it, we do not adopt his factual allegations."); Sharp v. Fisher, No. 406-CV-020, 2007 U.S. Dist. LEXIS 54535, at *3 (S.D. Ga. July 26, 2007) ("[B]ecause [the] evidence includes three different videos of the [high-speed pursuit] in question, the Court 'views the facts in the light depicted by the video[s].'"); Martinez v. City of Auburn, No. C06-0447, 2007 U.S. Dist. LEXIS 49236, at *3 (W.D. Wash. July 9, 2007) (Because "[t]he Supreme Court has recently endorsed reliance in [videotape] evidence, . . . the Court outlines the events that lead [sic] to the shooting as shown in the video . . . ."); Miller v. Jensen, No. 06-CV-0328, 2007 U.S. Dist. LEXIS 39252, at *11 (N.D. Okla. May 29, 2007) ("Even though plaintiff is the nonmoving party, the Court will not adopt plaintiff's version of the facts if it clearly contradicts the factual depictions in the videotapes."); Mott v. City of McCall, No. CV-06-063, 2007 U.S. Dist. LEXIS 35241, at *2-3 (D. Idaho May 14, 2007) ("[F]or purposes of Defendants' summary judgment motion, the Court will view the facts in the light most favor [sic] to Plaintiff, except for those facts that are depicted by the videotape.").

B. Refusal to Consider Alternatives to Deadly Force

As disturbed as the majority apparently was by the videotaped pursuit, it is not surprising that the it rejected Harris's suggestion that the public's safety could have been equally well maintained had the officers simply ceased their pursuit and let Harris "escape."[117] In rejecting this argument, the majority pointed out that ceasing pursuit would not have ensured that Harris would have suddenly begun to drive normally again and, therefore, the public would still be in danger.[118] But the majority's analysis is suspect because it did not consider alternatives to end the pursuit other than complete cessation or deadly force. In fact, a number of feasible alternatives existed between these two extremes that could have ended the pursuit without injury to the public, the police, or the perpetrator.[119]

By refusing to take these alternatives into account, the majority painted itself into a syllogistic corner: ending high-speed pursuits protects the public; deadly force is guaranteed to end a high-speed pursuit; therefore, in order to protect the public, deadly force must be used to end high-speed pursuits. This overly simplified approach created an artificial dichotomy of complete cessation or deadly force that lent deadly force a semblance of objective reasonableness that it may not have deserved. By relying on this artificial dichotomy, the majority had no need to recognize that Deputy Scott had a third option, and this tilted the balance in favor of deadly force. Under *Scott*, courts do not appear to have any responsibility to factor alternative options for ending high-speed pursuits into their balancing analyses; rather, they are free to rely on the majority's artificial dichotomy. Furthermore, by taking a firm stance in support of deadly force, *Scott* may have inadvertently discouraged law enforcement agencies' adoption and use of alternative options for ending high-speed pursuits.

The majority's position—that ceasing pursuit would not have been as effective as the use of deadly force—is a disputable one. Indeed, one survey found that seventy percent of "jailed suspects who had been involved in a high-speed pursuit . . . would have slowed down if police had terminated the pursuit."[120] Although the post-capture ponderings of suspects likely facing substantial jail time are perhaps not the most reliable predictor of future suspects' behavior, some commentators have come to a similar conclusion by focusing less on the role of the suspect in the pursuit and more on the role of the police.

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117. *Scott*, 127 S. Ct. at 1778.
118. *Id.* at 1779.
119. *Id.* at 1783.
120. Patrick T. O'Connor & William L. Norse, Jr., *Police Pursuits: A Comprehensive Look at the Broad Spectrum of Police Pursuit Liability and Law*, 57 MERCER L. REV. 511, 513 (2005-06).

Kathryn R. Urbonya suggests that police, by engaging in a pursuit, exert "psychological force" on the suspect.[121] The act of pursuit "not only communicate[s] a command to stop, but also that the police will continue to pursue until the individual stops."[122] The psychological force in a pursuit creates a vicious cycle: the more the police gain on a suspect's vehicle, the faster the suspect will go in order to get away.[123] The police, in turn, will increase their speed to keep up with the suspect.[124] The entire process carries on, presumably, until the vehicles reach their mechanical limits. Thinking of a high-speed pursuit in terms of psychological force puts the pursuit squarely in the control of the police: "By abandoning the pursuit, the psychological force compelling the [suspect] to continue the pursuit ceases."[125] If Professor Urbonya is correct, many high-speed pursuits could be safely terminated by simply letting the suspect go.

Whatever validity Professor Urbonya's theory may have, it is of course inapplicable unless the police decide to actually pursue a suspect. Although most commentators agree that the police should sometimes be permitted to engage in high-speed pursuits, there is substantial disagreement over when.[126] Because the vast majority of high-speed pursuits do not involve suspects whose underlying offenses pose a great danger to society,[127] Travis N. Jensen argues that high-speed pursuits should be limited to "violent felony suspects" whose escape would imperil society.[128] To facilitate this, Jensen puts forward a "categorical approach" that would obviate the need for officers to "perform a complex balancing test in the seconds before each decision to pursue."[129] "It is clear," he

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121. Kathryn R. Urbonya, *The Constitutionality of High-Speed Pursuits Under the Fourth and Fourteenth Amendments*, 35 ST. LOUIS U. L.J. 205, 233 (1991).

122. *Id.* at 234.

123. *See id.* at 235 n.153 ("At a dog race, in order to make the dogs run faster, a metal frame is placed in front of them with the appearance of a rabbit on it. The dogs' pace increases as the speed of the frame moves faster. . . . [T]he police officers' vehicle represents a similar kind of compulsion to the pursued driver, except this time the force is behind the driver.").

124. *Id.*

125. *Id.* at 234-35.

126. *See, e.g.*, Michael Douglas Owens, Comment, *The Inherent Constitutionality of the Police Use of Deadly Force to Stop Dangerous Pursuits*, 52 MERCER L. REV. 1599 (2001). Owens, a former sheriff's deputy-turned-law student, argues that police officers are always constitutionally justified to end high-speed pursuits through deadly force. *Id.* at 1600. Owens posits that a person fleeing the police in a vehicle always presents a threat of death or serious physical harm to others. *Id.* at 1631. This threat from a suspect who "has a two thousand-pound weapon at his fingertips," he writes, is sufficient to warrant the use of deadly force. *Id.* at 1632. Furthermore, Owens points out that the reasonableness of the use of deadly force should be "judged solely with reference to the danger presented by the suspect's flight"—not by the suspect's underlying offense. *Id.* at 1633. Because evading the police is a crime in and of itself, Owens argues, the "predicate offense for which the stop was initiated" becomes irrelevant: it is the pursuit that endangers the public, not the initial offense. *Id.* at 1635.

127. A high-speed pursuit's most frequent impetus is a minor traffic offense. O'Connor & Norse, *supra* note 120, at 512; Urbonya, *supra* note 121, at 225.

128. Travis N. Jensen, Note, *Cooling the Hot Pursuit: Toward a Categorical Approach*, 73 IND. L.J. 1277, 1292 (1998).

129. *Id.*

writes, "that a suspect's escape must equal [a pursuit's] inherent risk to society before a pursuit could be justified."[130] Pursuits over "minor crimes and traffic violations," Jensen concludes, are unacceptable.[131] Assuming that fewer high-speed pursuits create fewer injuries, it may be safer for police to not engage in pursuits at all.[132]

But neither Professor Urbonya's theory of slowing a high-speed pursuit by letting the suspect go, nor Jensen's proposal of summarily avoiding high-speed pursuits, answer a question that seemed crucial to the holding in *Scott*: namely, if Deputy Scott would have discontinued the pursuit, how would Harris have known that the pursuit was over? Harris, the majority posited, "might have been just as likely to respond by continuing to drive recklessly as by slowing down and wiping his brow."[133] Rather than "tak[ing] that chance and hop[ing] for the best," the majority concluded that "Scott's action—ramming [Harris] off the road—was *certain* to eliminate the risk that [Harris] posed to the public . . . ."[134]

The majority's question is more than mere conjecture: at least one survey of fleeing suspects revealed that they "often did not know whether a pursuit had been called off."[135] Even so, the majority failed to consider alternative options that may have been equally "certain" to eliminate the risk Harris posed to the public. Perhaps the most available alternative is the "stopstick." This device is a spiked strip that is carried in the trunk of a police car.[136] An officer deploys the stopstick in the path of the suspect's vehicle and, after the suspect passes over it, the officer pulls the stopstick off the road to allow the pursuing police vehicles to pass.[137] The spikes from the stopstick puncture the suspect's tires and allow them to slowly deflate, bringing the vehicle to a controlled stop.[138] Also available is "air support and photographic evidence of identity."[139] Although a small department like the one Deputy Scott belonged

130. *Id.*

131. *Id.* at 1277.

132. Police departments have indeed implemented policies similar to that proposed by Jensen: after adopting a policy restricting pursuits to violent felonies, for example, the Metro-Dade Police Department reduced its pursuits from 279 in 1992 to 51 in 1993. Geoffrey P. Alpert, Andrew C. Clarke & William C. Smith, *The Constitutional Implications of High-Speed Police Pursuits Under a Substantive Due Process Analysis: Homeward Through the Haze*, 27 U. MEM. L. REV. 599, 621 (1996-97). Likewise, the Houston Police Department experienced a 40 percent drop in pursuits after adopting a more restrictive pursuit policy. *Id.*

133. Scott v. Harris, 127 S. Ct. 1769, 1778 (2007).

134. *Id.* at 1778-79

135. O'Connor & Norse, *supra* note 120, at 513.

136. John Hill, *High-Speed Police Pursuits: Dangers, Dynamics, and Risk Reduction*, FBI LAW ENFORCEMENT BULL., July 2002, at 13, 16, *available at* http://www.fbi.gov/publications/leb/2002/july2002/july02leb.htm.

137. *Id.*

138. *Id.*

139. Jensen, *supra* note 128, at 1294.

to probably could not afford to operate a helicopter, [140] it definitely could afford video equipment (as evidenced by the videotape of the chase). With the suspect's license plate number and criminal activity clearly recorded on videotape, the police could arrest him at a later time by simply showing up at his residence. Finally, as Justice Stevens suggested in his dissent, "a simple warning issued from a loudspeaker . . . could have avoided such a tragic result."[141]

Though theories such as Professor Urbonya's, policy proposals such as Jensen's, and devices such as the stopstick are all somewhat imperfect, they would necessarily affect the outcome of a Fourth Amendment balancing analysis. In *Scott*, however, the majority proceeded as if these alternatives did not exist: because Harris "intentionally placed himself and the public in danger by unlawfully engaging in [a] reckless, high-speed flight" and ignored the implied warnings of the "[m]ultiple police cars, with blue lights flashing and sirens blaring, [that] had been chasing [him] for nearly 10 miles," it was Harris who "ultimately produced the choice between two evils that Scott confronted."[142] The problem with this conclusion is that Deputy Scott had a choice between more than "two evils."

Because it assumed that only deadly force would ensure the public's safety, and that the public's safety took priority over the "risk of bodily harm" to Harris, the majority unqualifiedly found Deputy Scott's use of deadly force to be objectively reasonable.[143] But the majority's objective reasonableness analysis rests on a questionable premise. By classifying complete cessation as allowing Harris to continue endangering the public, and deadly force as preventing Harris from endangering the public, the majority left itself with no real choice: *of course* Harris should be prevented from endangering the public. Any reasonable officer in the same circumstances—that is, a reasonable officer shackled by an artificial dichotomy of complete cessation or deadly force—would have used such force.[144] The "threat to the public" side of the metaphorical balance (already heavily weighted by the majority's interpretation of the videotape) would have been weighted even more if Deputy Scott had completely ceased the pursuit and let Harris drive on and further endanger the public. Under the artificial dichotomy, therefore, Deputy Scott's only objectively reasonable option was deadly force.

Yet had the majority taken pursuit psychology into account, Deputy Scott's use of deadly force may have looked less objectively reasonable

140. The Coweta County Sheriff's Department is comprised of 54 officers who patrol 442 square miles of rural Coweta County and, apparently, do not possess a helicopter. Coweta County Sheriff's Office, http://www.cowetaso.com/Patrol.html (last visited Sept. 30, 2007).

141. Scott v. Harris, 127 S. Ct. 1769, 1785 (2007).

142. *Id.* at 1778.

143. *Id.* at 1779.

144. *See* discussion of *Graham supra* p. 466.

in light of the theory that pursuit causes a fleeing suspect to drive faster. Had the majority taken the lack of a categorical pursuit policy[145] into account, Deputy Scott's use of deadly force may have looked less objectively reasonable in light of the fact that the pursuit stemmed from an insignificant traffic violation.[146] And had the majority taken the failure to use stopsticks or issue a loudspeaker warning before resorting to deadly force into account, Deputy Scott's use of deadly force may have looked less objectively reasonable in light of the relative ease by which these measures could have been taken. Of course none of these alternatives, which all happen to fall somewhere between complete cessation and deadly force, were ever considered by the majority in deciding the objective reasonableness of Deputy Scott's use of deadly force.

The majority's artificial dichotomy of complete cessation or deadly force may go well beyond the immediate result in *Scott*. First, it potentially relieves courts of the responsibility to factor in alternative methods of ending high-speed pursuits. Courts may be able to decide whether a high-speed pursuit warranted deadly force without addressing all of an officer's available options. Second, it may also have inadvertently set back law enforcement agencies' adoption of safer methods of stopping fleeing suspects by failing to provide any incentive for their implementation.

Although courts have characterized *Garner* as asking whether "a reasonable non-deadly alternative exist[ed] for apprehending the suspect,"[147] *Scott*'s holding seems to override this concern for alternatives in high-speed pursuit scenarios. Even the importance of *Graham*'s factors for determining objective reasonableness—the severity of the crime, the immediacy of the threat, the suspect's resistance, and the potential for evasion[148]—seem diminished in light of the majority's artificial dichotomy. Rather, *Scott* directs courts to consider only the certainty of deadly force, or the uncertainty of complete cessation.[149] Some courts have already embraced this rationale.[150]

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145. The Coweta County Sheriff's Department had a pursuit policy which left "decisions regarding the initiation, continuation, and termination of pursuits . . . to the discretion of the officer and supervisor in the field." Harris v. Coweta County, No. 01-CV-148, at *6 (N.D. Ga. Sept. 25, 2003) (order denying in part summary judgment). This "judgmental" policy is substantially more liberal than the "categorical" policy advocated by Jensen.

146. *Scott*, 127 S. Ct. at 1772.

147. Brower v. County of Inyo, 884 F.2d 1316, 1318 (9th Cir. 1989).

148. Graham v. Connor, 490 U.S. 386, 396 (1989).

149. *Scott*, 127 S. Ct. at 1778-79.

150. The Eleventh Circuit held, for example, that an officer reasonably used deadly force when he rammed the vehicle of a fleeing suspect whom the officer suspected of driving under the influence. Beshers v. Harrison, No. 05-17096, 2007 U.S. App. LEXIS 19289, at *1 (11th Cir. Aug. 14, 2007). The collision caused the suspect's vehicle to roll over several times, resulting in the suspect's death. *Id.* at *5. The court reasoned that, because Scott "specifically rejected the notion that police can protect the public by ceasing a pursuit," the officer's only reasonable option to ensure public safety was to use deadly force against the suspect. *Id.* at *20-21. Similarly, the Fourth Circuit held that an officer's decision to ram a fleeing motorcyclist off the road, which resulted in the motorcy-

Fourth Amendment reasonableness for the use of deadly force, even before *Scott*, never insisted that courts second-guess the judgment of a reasonable officer on the scene.[151] But with the many options to terminate high-speed pursuits other than complete cessation or deadly force, the majority's artificial dichotomy ignores the tools that are readily available to reasonable officers on the scene. Under the majority's analysis in *Scott*, therefore, courts do not have to account for objective reality in determining objective reasonableness.

A further ramification of the majority's artificial dichotomy may be its effect on law enforcement agencies. Although the trend in law enforcement has been toward adopting restrictive pursuit policies and deploying alternative devices for terminating pursuits,[152] *Scott* failed to offer any kind of incentive to continue this trend. While officer safety is a constant concern in attempting to end high-speed pursuits, the threat of litigation, too, has loomed over law enforcement in high-speed pursuit situations.[153] *Scott* may have removed the threat of litigation as a check against officers' use of deadly force in high-speed pursuits. It may also have taken away law enforcement agencies' incentives to invest in the development of restrictive pursuit policies and the adoption of alternative tools to end pursuits. If it discourages law enforcement agencies from adopting alternatives to deadly force, the majority's artificial dichotomy may indeed prove a self-fulfilling prophesy.

CONCLUSION

It is true that the majority did not resurrect the draconian common law precept of allowing officers to kill fleeing suspects rather than pursue them. Far from it: the majority faithfully applied the Fourth Amendment balancing test developed by *Garner* and *Graham*. But tilting the metaphorical balance in favor of deadly force by relying on questionable factual premises has the potential to compel similar results. After *Scott*, the use of deadly force in high-speed pursuits appears almost per se reasonable. And in cases where videotape evidence is presented, it looks as if judges rather than juries have the final word in resolving questions of reasonableness. Furthermore, *Scott* may free courts from analyzing all of an officer's options for terminating a high-speed pursuit, and may also

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clist's death, was reasonable under Scott because "an officer's decision whether to let a suspect go in the hopes of catching him later is not governed by just how dangerous the suspect can make the pursuit." Abney v. Coe, No. 06-1607, 2007 U.S. App. LEXIS 15841, at *17 (4th Cir. July 3, 2007). The court wrote that the officer faced a "dreadful choice" of complete cessation or deadly force. *Id.* at *18. Following Scott's artificial dichotomy, the court concluded that the officer's only option to protect the public was deadly force. *Id.*

151. *See* discussion of objective reasonableness *supra* p. 465-66.

152. Alpert, Clarke & Smith, *supra* note 132, at 604-06.

153. Erik Savas, Comment, *Hot Pursuit: When Police Pursuits Run Over Constitutional Lines*, 1998 DET. C.L. REV. 857, 858-59 (1998).

have reduced law enforcement agencies' incentives to adopt alternatives to deadly force for ending high-speed pursuits.

As Justice Stevens posited in his dissenting opinion, the answer to the question of whether an officer reasonably used deadly force to end a high-speed pursuit depends on the particular circumstances: it "may be an obvious 'yes,' an obvious 'no,' or sufficiently doubtful that the question . . . should be decided by a jury, after a review of the degree of danger and the alternatives available to the officer."[154] But by concluding that no reasonable jury could disagree with its interpretation of the videotape, and analyzing objective reasonableness in the context of an artificial dichotomy of complete cessation or deadly force, the *Scott* majority took the decision from the hands of the jury and the constraints of reality, and set a precedent of imbalance and unreasonableness.

Forrest Plesko[*]

154. Scott v. Harris, 127 S. Ct. 1769, 1781 (2007) (Stevens, J., dissenting).

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NON-OBVIOUSNESS: THE FULCRUM OF COMBINATION PATENT VALIDITY

INTRODUCTION

Current patent law requires an inventor to demonstrate an invention is novel,[1] useful,[2] and non-obvious[3] for issuance of a valid patent.[4] Assuming the elements of utility[5] and novelty[6] are satisfied for the "combination patent"[7] at issue, the validity of the combination patent claim will teeter on the fulcrum of the non-obviousness doctrine.

In *KSR International Co. v. Teleflex Inc.*,[8] the United States Supreme Court held that inventors who apply for combination patents must satisfy a two-pronged test for non-obviousness to obtain a valid combination patent.[9] The first prong merges two Supreme Court tests: (1) the original "synergy" test,[10] where issuance of a combination patent is prohibited if a court or patent examiner determines the claimed subject matter was objectively obvious to a person of ordinary skill in the pertinent art;[11] and (2) the *Graham* test,[12] examining relevant secondary factors of obviousness. The second prong is the "teaching, suggestion, or motivation" (TSM) test[13] developed by the Court of Customs and Patent Appeals[14] as a soft standard to provide insight into patent claims.[15] In the context of combination patents, this dual-pronged analysis for non-obviousness provides a broad approach to patent validity. Overall, the *Teleflex* Court established a synthesized test that will affect patent law in legal, social, and economic ways.

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1. Tamir Packin, *A New Test for Obviousness in Combination Patents: Economic Synergy*, 28 CARDOZO L. REV. 957, 958 (2006); *see also* 35 U.S.C.A. § 101 (2007) (stating "[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent . . . .").

2. Packin, *supra* note 1, at 958, n.10 (stating the inventor must prove the invention "is new and that he invented it before anyone else"); *see also* 35 U.S.C.A. § 102 (2007).

3. *See* 35 U.S.C.A. § 103 (2007).

4. Packin, *supra* note 1, at 964 (citing 35 U.S.C.A. §§ 101-03 (2007)).

5. *Id.* at 959 n.12 (stating the three part test to prove the utility element).

6. *Id.* at 959 n.13 (stating combination patents by definition are novel and therefore satisfy the novelty element).

7. *See* BLACK'S LAW DICTIONARY 1157 (8th ed. 2004) (defining a combination patent as a "patent granted for an invention that unites existing components in a novel way").

8. 127 S. Ct. 1727 (2007).

9. *See id.* at 1734.

10. *See infra* Part I.B.1 for a discussion of the Court's synergy test.

11. *See Teleflex*, 127 S. Ct. at 1734.

12. *See* discussion *infra* Part I.B.2.

13. *See* discussion *infra* Part I.B.3.

14. *See infra* p. 491 and note 69 (stating the Court of Customs and Patent Appeals merged with the United States Court of Claims in 1982 to form the United States Court of Appeals for the Federal Circuit).

15. *See Teleflex*, 127 S. Ct. at 1734.

Part I of this comment will examine the development of the non-obviousness doctrine by Congress and the courts. Part II will summarize the facts of *Teleflex* and the Supreme Court's holding. Part III will first argue that, on its face, *Teleflex* clarified the analysis for combination patent issuance. Additionally, it will argue that the Court's emphasis on a broad non-obviousness standard actually will produce legal, social, and economic benefits, along with some negative impacts on small businesses and independent innovators. However, further congressional legislation is necessary to streamline non-obviousness analysis. Accordingly, Part IV suggests Congress should intervene to clarify the non-obviousness analysis because this determination involves a policy discussion more appropriately suited for Congress. Finally, this comment concludes that the Court's interpretation of the non-obviousness doctrine will promote innovation in combination patents while rewarding worthy inventors with exclusive patent rights, but this policy decision should be addressed by Congress, not the Court.

I. THE RISE OF THE NON-OBVIOUSNESS DOCTRINE

Fundamentally, the thrust of the non-obviousness doctrine is an economic policy striking a balance between encouraging innovation and protecting the public from monopolistic patent rights.[16] Throughout U.S. patent law history, the non-obviousness requirement evolved slowly, reflecting uneasiness in general judicial application.[17] In a similar vein, determining non-obviousness for combination patents is particularly problematic because such patents involve combining existing elements, or "prior art," [18] to form a novel invention.[19] As background, the following two sections will provide the legislative history and the judicial interpretation of the non-obviousness doctrine.

A. Legislative History

Under its explicit power articulated in the Patent Clause of the U.S. Constitution,[20] Congress historically passed patent legislation to promote innovation, while simultaneously attempting to limit the grant of patent rights to new and useful inventions worthy of the "monopolies [that] produce more embarrassment than advantage to society."[21] Although the well established patentability elements historically included novelty and

16. Packin, *supra* note 1, at 962-67.

17. *Id.* at 963 n.43.

18. *Id.* at 957 n.2 (defining prior art as "[a]n invention that is already known"); *see also* BLACK'S LAW DICTIONARY, *supra* note 7, at 119 (defining prior art as "knowledge . . . that is available . . . at a given time to a person of ordinary skill in [the] art . . . .").

19. 35 U.S.C.A. § 103 (2007).

20. U.S. CONST. art. I, § 8, cl. 1, 8 (stating "Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

21. Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), *in* 13 THE WRITINGS OF THOMAS JEFFERSON, 326, 334 (Andrew A. Lipscomb et al. eds., 1903).

utility,[22] U.S. statutory patent law did not formally address obviousness until 1952.[23] In the absence of statutory guidance, the Supreme Court interpreted the non-obviousness doctrine in case law.[24] The Court most plainly stated the "long discussed"[25] non-obviousness standard in *Hotchkiss v. Greenwood*.[26]

In *Hotchkiss*, the plaintiffs held a patent for metallic knobs and sued "the defendants for the alleged infringement of a patent for a new and useful improvement in making door and other knobs of all kinds of clay . . . and of porcelain[,]" instead of metal.[27] The Court explained that,

> [n]o one will pretend that a machine, made, in whole or in part, of materials better adapted to the purpose for which it is used than the materials of which the old one is constructed, and for that reason better and cheaper, can be distinguished from the old one; or, in the sense of the patent law, can entitle the manufacturer to a patent.[28]

Simply, the Court held that merely substituting the material of a product is obvious, and therefore not patentable.

For over a century, courts tested the validity of patent claims based on congressional statutes requiring novelty and utility[29] and the third judicially created non-obviousness standard.[30] In *Cuno Engineering Corp. v. Automatic Devices Corp.*,[31] the Court stated "[t]he principle of the *Hotchkiss* case applies to the adaptation or combination of old or well known devices for new uses."[32] Further, the Court held that "the new device, however useful it may be, must reveal the flash of creative genius not merely the skill of the calling."[33]

Under the flash of creative genius test, patents were not granted for new inventions "if the 'result claimed as new is the same in character as the original result[,]' even though the new result had not before been contemplated."[34] As the Court had done almost one hundred years prior, it interpreted the non-obviousness doctrine in the absence of legislative action. Eventually, Congress passed two statutes that included provi-

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22. *See* Christopher A. Harkins, *Fending Off Paper Patents and Patent Trolls: A Novel "Cold Fusion" Defense Because Changing Times Demand It*, 17 ALB. L.J. SCI. & TECH. 407, 419-22 (2007).
23. *See* John H. Barton, *Non-Obviousness*, 43 IDEA 475, 476 (2003).
24. *Id.*
25. *Id.*
26. 52 U.S. (11 How.) 248 (1850).
27. *Id.* at 264.
28. *Id.* at 266.
29. *See* Harkins, *supra* note 22, at 419-22.
30. *See id.*
31. 314 U.S. 84 (1941).
32. *Id.* at 91.
33. *Id.*
34. *Id.* (citations and internal quotation marks omitted).

sions for non-obviousness and that remained the primary statutory authority of modern patent law.[35]

1. The Patent Act of 1952[36]

In the late 1940s, patent law reformers concerned with the strict flash of creative genius test put pressure on Congress to update U.S. patent law.[37] To remedy this concern, Congress codified the Supreme Court's *Hotchkiss* standard for non-obviousness[38] in the Patent Act of 1952.[39] This statute requires all inventors applying for a patent to prove their invention was a non-obvious advance over the prior art to obtain a valid patent.[40] Thus, as a policy matter, Congress superseded the flash of creative genius test with a statutory non-obviousness element.

2. 35 U.S.C. § 103 (1966)[41]

In 1966, Congress passed Title 35 of the United States Code, requiring "an applicant to show that his [or her] invention is useful, novel, and non-obvious in order to obtain a patent."[42] With respect to obviousness, 35 U.S.C. § 103 provides that an inventor seeking a patent must prove a person having ordinary skill in the art would not find the invention obvious in light of the prior art.[43] Therefore, § 103 bars patent issuance when "the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains."[44]

3. The Patent Reform Act of 2007[45]

Notably, on April 18, 2007, Congress introduced "patent reform legislation in the 'Patent Reform Act of 2007.' If signed into law, the legislation would bring the biggest, most sweeping changes to U.S. patent law in over 50 years."[46] However, "early reports suggest that the Patent Reform Act of 2007 is hitting some snags and may not pass without amendments to or deletions of certain sections . . . ."[47]

35. *See infra* Parts I.A.1 and I.A.2 for a brief discussion of both current congressional statutes.
36. Patent (Bryson) Act of 1952, Pub. L. No. 82-593, § 10, 66 Stat. 792 (codified as amended at 35 U.S.C.A. § 103 (2007)).
37. Barton, *supra* note 23, at 476 (citing *Cuno*, 314 U.S. at 91).
38. Hotchkiss v. Greenwood, 52 U.S. (11 How.) 248 (1850).
39. Pub. L. No. 82-593, 66 Stat. 792.
40. Packin, *supra* note 1, at 964 (citing Pub. L. No. 82-593, 66 Stat. 792).
41. 35 U.S.C.A. § 103.
42. Packin, *supra* note 1, at 964.
43. 35 U.S.C.A § 103.
44. *Id.*
45. Patent Reform Act of 2007, H.R. 1908 and S. 1145, 110th Cong. (1st Sess. 2007).
46. Harkins, *supra* note 22, at 422.
47. *Id.* at 423.

Regardless, the proposed legislation does not address any potential issues of non-obviousness arising out of *Teleflex* because the legislation was drafted prior to the *Teleflex* decision. The proposed Patent Reform Act of 2007 lists non-obviousness as a condition for patentability and provides for the following amendment to 35 U.S.C. § 103:

> A patent for a claimed invention may not be obtained though the claimed invention is not identically disclosed as set forth in section 102, if the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been obvious before the effective filing date of the claimed invention to a person having ordinary skill in the art to which the claimed invention pertains. Patentability shall not be negated by the manner in which the invention was made.[48]

However, in this proposed amendment, Congress did not address any specific test for the judicial application of non-obviousness. As this comment will discuss in Part IV, Congress has an opportunity with the Patent Reform Act of 2007 to clarify the broad non-obviousness standard set forth by the Court.

B. Judicial Interpretation of Patent Law Statutes and Creation of Non-Obviousness Tests

Judicial interpretation became an integral part of the non-obviousness doctrine, especially for combination patents. The Supreme Court preserved the authority of *Hotchkiss*[49] even after Congress solidified non-obviousness as a requirement for patent issuance.[50] Specifically, the Court has employed three tests to further define and guide the non-obvious doctrine: (1) the synergy test for all patents; (2) the *Graham* test for combination patents; and (3) the TSM test for combination patents.

1. The Synergy Test[51]

Prior to the Patent Act of 1952,[52] the Supreme Court established the synergy test for combination patents because, by their nature, "the combination of existing elements failed to achieve unusual or surprising consequences as the elements did not perform any additional or different function in the combination than they perform out of it."[53] The synergy test developed as a special lens to examine the obviousness of combina-

48. H.R. 1908 § 3(c).
49. Hotchkiss v. Greenwood, 52 U.S. (11 How.) 248 (1850).
50. Packin, *supra* note 1, at 968.
51. Great Atl. & Pac. Tea Co. v. Supermarket Equip. Corp., 340 U.S. 147, 152-53 (1950) (introducing the synergy test).
52. Patent (Bryson) Act of 1952, Pub. L. No. 82-593, § 10, 66 Stat. 792 (codified as amended at 35 U.S.C.A. § 103 (2007)).
53. Packin, *supra* note 1, at 968 (quoting *Great Atl. & Pac. Tea Co.*, 340 U.S. at 152 (internal quotation marks omitted)).

tion patents.[54] Simply put, the synergy test takes a functional approach to assess patent validity: a combination patent is not obvious if the patent produces "a new or different function."[55] The Court explained further that under the synergy test, a patent applicant can demonstrate non-obviousness by showing "synergistic effects."[56]

Following the enactment of § 103, the Court continued to apply and elaborate on the synergy test.[57] The Court expounded that the "functional synergy test presumes invalidity of a combination patent unless there is a synergistic effect of the elements in the combination claim."[58] Thus, current application of the synergy test requires an examination of each individual element of the combination patent followed by a final examination of the combined invention.[59]

2. The *Graham*[60] Test

Fourteen years after Congress enacted 35 U.S.C. § 103, in the *Graham* case, the Court heard an obviousness issue requiring statutory interpretation of § 103.[61] In this seminal decision, the Court interpreted the language of § 103 and established the framework for an objective, factor-based test for obviousness.[62] The Court held:

> Under § 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background the obviousness or nonobviousness [sic] of the subject matter is determined. Such secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented.[63]

The *Graham* test encompasses this factor-based analysis; if the subject matter of the patent is conclusively obvious, the patent claim is invalid.[64]

As a policy matter, the Court reasoned that consideration of these secondary factors was essential to the constitutional foundations of the

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54. *Id.* at 969.
55. Anderson's-Black Rock, Inc. v. Pavement Salvage Co., 396 U.S. 57, 60 (1969) (quoting Lincoln Eng'g Co. v. Stewart-Warner Corp., 303 U.S. 545, 549 (1938) (internal quotation marks omitted))
56. Packin, *supra* note 1, at 969 (citing Sakraida v. Ag Pro, Inc., 425 U.S. 273, 282 (1976)).
57. *See, e.g., Sakraida*, 425 U.S. at 282; *Anderson's-Black Rock*, 396 U.S. at 61-63; United States v. Adams, 383 U.S. 39, 48, 50-52 (1966).
58. Packin, *supra* note 1, at 969 (citing Glynn S. Lunney, Jr., *E-Obviousness*, 7 MICH. TELECOMM. & TECH. L. REV. 363, 379-80 (2001)).
59. *Id.*
60. Graham v. John Deere Co., 383 U.S. 1 (1966).
61. *Id.* at 3.
62. KSR Int'l Co. v. Teleflex, Inc., 127 S. Ct. 1727, 1734 (2007).
63. *Graham*, 383 U.S. at 17-18.
64. *Teleflex*, 127 S. Ct. at 1734.

non-obviousness doctrine,[65] namely, promoting "the Progress of Science and useful Arts."[66] The Court further proclaimed the original legal standards set forth in *Hotchkiss* remained valid, undisturbed precedent bolstered by the *Graham* test.[67] Additionally, the *Graham* test provided "a broad inquiry and invited courts . . . to look at any secondary considerations that would prove instructive."[68] The latter policy reflects the loosening of the judicial standard for the non-obviousness doctrine.

3. The Teaching, Suggestion, or Motivation ("TSM") Test

In 1982, Congress created the United States Court of Appeals for the Federal Circuit ("Federal Circuit") to handle patent law cases.[69] The Federal Circuit was created for three purposes: "ending forum-shopping in patent suits, settling differences in patent-law doctrines among the circuits, and allowing a single forum to develop the expertise needed to rule on complex technological questions that arise in patent suits."[70] "Seeking to resolve the obviousness question with more uniformity and consistency," the Federal Circuit independently developed the TSM test as a third approach to non-obviousness.[71] The TSM test requires a patent applicant to demonstrate "a teaching, suggestion, or motivation to combine known elements in order to show that the combination is obvious."[72]

Under this approach, a patent claim is obvious when "'some motivation or suggestion to combine the prior art teachings' can be found in the prior art, the nature of the problem, or the knowledge of a person having ordinary skill in the art."[73] This test is useful to "identify a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements in the way the claimed new invention does."[74]

In summary, Congress passed two statutes that currently control patent claims, the Patent Act of 1952 and 35 U.S.C. § 103. Both statutes require evidence of non-obviousness for patent issuance. In addition, Congress recently proposed the Patent Reform Act of 2007 to further

65. Barton, *supra* note 23, at 477.
66. U.S CONST. art. 1, § 8, cl. 8.
67. Packin, *supra* note 1, at 968.
68. *Teleflex*, 127 S. Ct. at 1739 (citing Graham v. John Deere Co., 383 U.S. 1, 17 (1966)).
69. *See* BLACK'S LAW DICTIONARY 1570 (8th ed. 2004) (defining the Federal Circuit as "[a]n intermediate-level appellate court with jurisdiction to hear appeals in patent cases . . . . The court originated in the 1982 merger of the Court of Customs and Patent Appeals and the U.S. Court of Claims . . . .").
70. *Id.*
71. *Teleflex*, 127 S. Ct. at 1734.
72. *Id.* at 1741. The TSM test was created by the Court of Customs and Patent Appeals to provide helpful insight to combination patents. *Id.*; *see also* Application of Bergel, 48 C.C.P.A. 1102, 956-57 (1961) (holding that a specific chemotherapy compound is patentable because a prior suggestion that it may be possible to combine known compounds to inhibit tumor growth did not also suggest the desirability of combining those known compounds.).
73. *Teleflex*, 127 S. Ct. at 1734 (quoting Al-Site Corp. v. VSI Int'l, Inc., 174 F.3d 1308, 1323-24 (Fed. Cir. 1999)).
74. *Id.* at 1741.

reform modern patent law, but the new legislation does not address the appropriate standard for non-obviousness analysis. Further, the judiciary has independently developed three analytical tests for the non-obviousness element: the synergy test, the *Graham* test, and the TSM test. With a basic understanding of the legislative and judicial history of the non-obviousness doctrine, this comment will shift its focus to the landmark *Teleflex* case.

II. *KSR INTERNATIONAL CO. V. TELEFLEX INC.*

In *KSR International Co. v. Teleflex Inc.*, the Supreme Court unanimously rejected the Federal Circuit's rigid application of the TSM test for obviousness,[75] and reaffirmed the historical pedigree and current applicability of its broader approach to obviousness.[76]

A. Facts

In 1999, petitioner KSR International Company ("KSR") designed and patented an adjustable accelerator pedal system for automobiles with cable-actuated throttles.[77] In 2001, Respondent Teleflex Incorporated ("Teleflex"), a competitor, obtained the exclusive license to the Engelgau combination patent,[78] describing an adjustable accelerator pedal system for automobiles with electronically-actuated throttles, including an electronic sensor fixed to the pivot of the pedal.[79] However, in 2000, to meet growing industry demands, KSR modified its design by adding a modular sensor to its adjustable pedal system for compatibility with vehicles using computer-controlled throttles.[80]

Following KSR's modification and subsequent refusal to enter into a royalty agreement, Teleflex sued KSR for infringing the Engelgau patent.[81] In a motion for summary judgment, KSR argued that the Engelgau combination patent was invalid because the design was obvious "in light of the prior art in existence when the claimed subject matter was invented."[82] To determine the validity of the Engelgau patent, the United States District Court for the Eastern District of Michigan applied the *Graham* framework and the TSM test.[83] After finding KSR satisfied both tests, the district court granted summary judgment in favor of KSR, holding that the Engelgau combination patent was obvious.[84]

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75. *Id.* at 1739.
76. *See id.* at 1739-41.
77. U.S. Patent No. 6,151,976 (filed July 16, 1999).
78. U.S. Patent No. 6,237,565 (filed Aug. 22, 2000).
79. *Teleflex*, 127 S. Ct. at 1736-37. .
80. *Id.* at 1735-36.
81. *Id.* at 1737.
82. *Id.* at 1737-38.
83. Teleflex, Inc. v. KSR Int'l Co., 298 F. Supp. 2d 581, 587-96 (E.D. Mich. 2003), *vacated and remanded*, 119 F. App'x 282 (Fed. Cir. 2005), *rev'd*, 127 S. Ct. 1727 (2007).
84. *Id.* at 596.

On appeal, the Federal Circuit reversed the district court decision and held that the trial court did not apply a strict enough application of the TSM test.[85] Departing from Supreme Court precedent, the Federal Circuit took a narrow view of obviousness, reasoning "that courts and patent examiners should look only to the problem the patentee was trying to solve."[86] The Federal Circuit further held that expert testimony as to non-obviousness raised genuine issues of material fact that precluded summary judgment.[87] The Supreme Court granted certiorari.[88]

B. The Supreme Court's Holding

In a unanimous opinion written by Justice Kennedy, the Supreme Court reversed the Federal Circuit.[89] The Court identified four errors in the Federal Circuit's strict TSM analysis.[90] First, the Court held the "particular motivation [or] the avowed purpose of the patentee" does not control, rather "the objective reach of the claim" or "whether the combination was obvious to a person with ordinary skill in the art" controls.[91] Second, it held the Federal Circuit was incorrect in assuming "a person of ordinary skill attempting to solve a problem" will utilize only certain elements of the prior art.[92] Moreover, the Court stated a person of ordinary skill is creative, fitting "the teachings of multiple patents together like pieces of a puzzle."[93]

Third, the Court held the Federal Circuit erred in concluding "a patent claim cannot be proved obvious merely by showing that the combination of elements was 'obvious to try.'"[94] Instead, the Court explained that "a person of ordinary skill has good reason to pursue the known options within his or her technical grasp" when the market applies pressure for new designs.[95] Fourth, the Court held the Federal Circuit erred in arguing that courts and patent examiners risk "falling prey to hindsight bias."[96] Although the Supreme Court recognized that hindsight bias is a problem, the Court reasoned that strict "preventative rules that deny fact-

85. *Teleflex*, 127 S. Ct. at 1738; *see also* Teleflex, Inc. v. KSR Int'l Co., 119 F. App'x 282, 288 (Fed. Cir. 2005), *rev'd*, 127 S. Ct. 1727 (2006).

86. *Teleflex*, 127 S. Ct. at 1742 (citing *KSR*, 119 F. App'x at 288).

87. *KSR*, 119 F. App'x at 289-90.

88. KSR Int'l Co. v. Teleflex, Inc., 126 S. Ct. 2965, 2966 (2006).

89. *Teleflex*, 127 S. Ct. at 1735.

90. *Id.* at 1741-42. The Court also noted that since the decision in the instant matter, the Federal Circuit has adopted a broader conception of the TSM test. *Id.* at 1743; *see, e.g.*, DyStar Textilfarben GmbH & Co. Deutschland KG v. C.H. Patrick Co., 464 F.3d 1356, 1367 (2006) ("Our suggestion test is in actuality quite flexible . . . ."); Alza Corp. v. Mylan Labs., Inc., 464 F.3d 1286, 1291 (2006) ("There is flexibility in our obviousness jurisprudence . . . .").

91. *Teleflex*, 127 S. Ct. at 1741-42.

92. *Id.* at 1742.

93. *Id.*

94. *Id.* (quoting Teleflex, Inc. v. KSR Int'l Co., 119 F. App'x 282, 289 (Fed. Cir. 2005), *rev'd*, 127 S. Ct. 1727 (2006)).

95. *Id.*

96. *Id.*

finders recourse to common sense . . . are neither necessary under our case law nor consistent with it."[97]

Contemporaneously, the Court reinforced its principal reason for disallowing combination patent claims for what is obvious: "[A] patent for a combination which only unites old elements with no change in their respective functions . . . obviously withdraws what is already known into the field of its monopoly and diminishes the resources available to skillful men."[98] The Court held the Engelgau patent claim was invalid as obvious because "mounting a modular sensor on a fixed pivot point . . . was a design step well within the grasp of a person of ordinary skill in the relevant art."[99]

Based on precedent addressing non-obvious combination patent claims,[100] the Court framed the appropriate issue as "whether the improvement is more than the predictable use of prior art elements according to their established functions."[101] The Court reasoned that "[i]f a person of ordinary skill can implement a predictable variation, § 103 likely bars its patentability."[102] In this case, the Court noted the pedal systems market created an increased demand to convert mechanical pedals to electronic pedals, and the prior art described many methods of conversion.[103] Furthermore, the Court held KSR's combination of established patent elements sufficiently supported the finding of obviousness because the claim resulted from common sense and ordinary skill, not innovation.[104]

Finally, the Court expounded that summary judgment was the appropriate procedural device and held that "[t]he ultimate judgment of obviousness is a legal determination."[105] This holding refuted the Federal Circuit's separate argument for reversing the district court on the grounds that summary judgment was inappropriate based on expert testimony.[106] The Federal Circuit's judgment reversing the summary judgment of invalidity was itself reversed by the Supreme Court, and the case was remanded for further proceedings.[107]

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97. *Id.* at 1742-43.

98. *Id.* at 1739 (internal quotation marks omitted) (quoting Great Atl. & Pac. Tea Co. v. Supermarket Equip. Corp., 340 U.S. 147, 152-53 (1950)).

99. *Id.* at 1746.

100. *See, e.g.*, Sakraida v. Ag Pro, Inc., 425 U.S. 273 (1976); Anderson's-Black Rock, Inc. v. Pavement Salvage Co., 396 U.S. 57 (1969); United States v. Adams, 383 U.S. 39 (1966).

101. *Teleflex*, 127 S. Ct. at 1740.

102. *Id.*

103. *Id.* at 1744

104. *See id.* at 1743-46.

105. *Id.* at 1745-46 (citing Graham v. John Deere Co., 383 U.S. 1, 17 (1966)).

106. *Id.* (noting that expert testimony should certainly be considered regarding questions of fact, but the final legal judgment is that of the court).

107. *Id.* at 1746.

In the wake of *Teleflex*, the precise impact of the Court's broad non-obviousness standard is unknown. The remainder of this comment will explore the potential legal, social, and economic effects of the *Teleflex* decision. Also, Part III will explain a new test as an alternative to the *Teleflex* standard.

III. ANALYSIS

On the surface, the *Teleflex* Court established a defined analysis for the non-obviousness doctrine.[108] The resulting two-pronged test for non-obviousness combined statutes and judicial tests into one comprehensive analysis. In the context of combination patents, the decision to reverse the Federal Circuit was proper because it reconciled the inconsistency of a strict test for non-obviousness, while fostering "new works based on instinct, simple logic, ordinary inferences, extraordinary ideas, and sometimes even genius."[109] The following analysis discusses the potential beneficial impact of the recent *Teleflex* decision and the emerging broad non-obviousness doctrine, despite some negative effects on small businesses and independent innovators.

A. The Legal Implications of the Supreme Court's Decision

The Supreme Court's broad non-obviousness standard is likely to have ramifications on patent law. Most importantly, the *Teleflex* decision will alter patent law by decreasing the overall number of patents issued. Additionally, the decision demonstrates the Court's reverence for *stare decisis* over the independent judgment of the Federal Circuit.

1. Decreased Patent Issuance

The first beneficial legal implication of the *Teleflex* decision is administrative. "The decision lowers the bar for proving obviousness. Parties charged with infringement will have a stronger legal basis for invalidating patents, particularly on summary judgment."[110] Logically, if the Supreme Court's broad test makes it more difficult to demonstrate the element of non-obviousness, then fewer patents will be issued and more will be held invalid. *Teleflex* "promises to create a stir in the industry by making it easier for defendants to prove invalidity, and thereby suggesting a transition of making it harder obtain (and preserve the validity of) patents based on the combination of known elements."[111]

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108. *Id.*
109. *Id.*
110. Irfan A. Lateef & Joshua Stowell, *Special Feature: A Supreme End to Patent Trolls?*, 49 ORANGE COUNTY LAW. 18, 22 (2007).
111. Harkins, *supra* note 22, at 467.

The new test also advances the federal policy of promoting innovation and rewarding true innovators with monopolistic patent rights.[112] A higher non-obviousness standard, coupled with the expenses of patent applications, will create incentives for inventors to make genuine inventions and deter applications for less innovative inventions. Furthermore, "the decision decreases the impact of threatened patent suits, especially when weak patents are at issue."[113]

In contrast, the Federal Circuit's rigid TSM approach "ignores exogenous economic or technological changes, which make something obvious suddenly valuable."[114] A lower standard for non-obviousness would create an incentive for inventors "to apply for many 'obvious' combinations, which increases the economic burden that the system imposes on a free market."[115] On the other hand, the new higher standard may produce excess litigation between parties fighting over the non-obviousness element.[116] Ultimately, the Supreme Court's standard articulated in *Teleflex* will encourage innovation by rewarding inventors who are genuinely original.

2. *Stare Decisis*

Another beneficial legal impact of the *Teleflex* decision is the victory for *stare decisis*. The Court unanimously refused to deviate from precedent established over one hundred and fifty years ago.[117] Although the concept of non-obviousness and the tests for non-obviousness developed over time,[118] the underlying policies set forth in *Hotchkiss* have not. Grounding its decision in the Constitution, the Supreme Court's holding in *Teleflex* reflects the underlying policy for the promotion and progression of useful arts.[119]

Although the Supreme Court adhered to precedent, the Federal Circuit has been critical of the Supreme Court's synergy test.[120] Presumably relying on its expertise in patent law, the Federal Circuit applied a strict TSM test because the synergy test invites hindsight bias.[121] But critics suggest the Federal Circuit's strict approach "essentially reduce[d] the

112. *Id.* at 468 ("Buoyed by policies of promoting innovation and the progress of science on the one hand, without the high price paid to legitimate competition on the other, one senses a return to the notion that an inventor must actually have invented something before being rewarded a patent monopoly[.]").

113. Lateef & Stowell, *supra* note 110, at 22.

114. Packin, *supra* note 1, at 977.

115. *Id.*

116. *See infra* Part III.B.2 for a discussion of the cost barriers for small businesses.

117. *See* Hotchkiss v. Greenwood, 52 U.S. (11 How.) 248 (1850).

118. *See supra* Part I for discussion of the rise of non-obviousness.

119. KSR Int'l Co. v. Teleflex, Inc., 127 S. Ct. 1727, 1746 (2007).

120. Packin, *supra* note 1, at 979 ("The Federal Circuit has criticized the Supreme Court's synergy test because it invites . . . the possibility that even though an invention is non-obvious and therefore patentable, when viewed in retrospect in light of the prior art, a person of ordinary skill in the art may use hindsight in determining that the invention is obvious.").

121. *Id.* at 980.

'level of ordinary skill' to nothing . . . [and] assume[d] no common knowledge."[122] In the end, the Supreme Court's application of the synergy test "has been said to be better suited for defining obviousness in combination patents."[123]

However, the Federal Circuit's departure from Supreme Court precedent implies a serious need for reform in patent law.[124] Since the Supreme Court's reversal, the Federal Circuit has moved away from a rigid TSM test because the strict application "sets a low standard for patentability and encourages patenting rather than innovation."[125] Ultimately, the Federal Circuit's deviation prior to the Court's *Teleflex* decision does little to hinder the victory of *stare decisis*, but it does provide an educated alternative for where the bar for non-obviousness should be set.

Remarkably, the Federal Circuit is not alone in criticizing the Supreme Court for setting a "higher bar for combination patents than for other types of patents."[126] The Federal Circuit applied a stricter application of the TSM test to broaden the non-obviousness analysis to all types of patents, thereby providing consistency.[127] Although the Court's decision abrogates the previous Federal Circuit test, the competing views of each court necessitate clarification by Congress regarding the appropriateness of the Supreme Court's new standard for non-obviousness.

B. The Social and Economic Implications of the Teleflex *Decision*

Only future studies will determine the long term social and economic impact of the *Teleflex* decision.[128] However, the underlying constitutional policies behind the Supreme Court's holding should shape the impact of its decision, particularly in the areas of innovation and monopoly, and barriers to small businesses.

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122. *Id.* (internal quotations omitted).

123. *Id.* (citing Lunney, *supra* note 58, at 390).

124. *Id.* at 979-80.

125. *Id.* at 977; *see also* Takeda Chem. Indus., Ltd. v. Alphapharm Pty., Ltd., 492 F.3d 1350, 1363 (Fed. Cir. 2007) (applying the Supreme Court's broad *Teleflex* standard and holding the patent at issue invalid for failing to overcome a prima facie case for obviousness).

126. Packin, *supra* note 1, at 979; *see also* Jungersen v. Ostby & Barton Co., 335 U.S. 560, 572 (1949) (Jackson, J., dissenting) (arguing the non-obviousness standard is too high and declaring "the only patent that is valid is one which the Court has not been able to get its hands on"); Homer J. Schneider, *Non-Obviousness, the Supreme Court, and the Prospects for Stability*, 60 J. PAT. OFF. SOC'Y 304, 318 (1978) (stating application "of the non-obviousness test is muddied, not clarified, by unexplained resort to . . . searches for 'synergism'").

127. Packin, *supra* note 1, at 976.

128. For the purposes of this comment, any foreign social and economic implications will not be addressed, but should be topic for another scholarly comment. Recently, a "bipartisan effort in Congress to overhaul the patent system . . . is hitting resistance because of concerns the U.S. might be exposed to greater foreign competition." Greg Hitt, *Patent System's Revamp Hits Wall*, WALL ST. J. (Wash., D.C.), Aug. 27, 2007, at A3.

1. Innovation and Monopoly

The fine balance of promoting innovation and protecting the right to profit from invention underscores all of patent law.[129] In *Teleflex*, the Supreme Court found an equilibrium between these two competing goals by rewarding genuine innovations with patents and denying patents for uncreative inventors who fail the non-obviousness test.[130] Although these policies are fundamentally different, the requirement for patent validity provides a filter for truly innovative patents.

2. Barriers for Small Businesses

Notably, the high costs accompanying compliance with U.S. patent law perpetuate a sweeping negative impact on small businesses and independent inventors.[131] The largest barrier for small businesses and independent inventors is the high litigation costs necessary to enforce patents against large corporations.[132] Also, "less-tangible costs related to patent protection"[133] create further barriers for small entities, including high filing costs,[134] patent insurance costs,[135] drafting and prosecution-related costs,[136] and opportunity costs.[137] In totality, these additional costs average a minimum total of $22,785.00 plus unrecoverable, intangible costs.[138] Thus, these costs minimize the economic incentives for innovation by small businesses and inventors.

Although the holding in *Teleflex* does not address these small business concerns, Congress should arguably reform patent laws to provide additional protection for the small entity innovators. The strongest area of patent law demanding reform for small businesses is litigation.[139] 35 U.S.C. § 282 addresses challenges to patent validity, stating that "a patent shall be presumed valid."[140] First, Congress can expand § 282 to include reasonable expert witness fees because the statute already provides for "reasonable attorney fees."[141] Second, Congress can remove the reduction cap on attorney fees when small entities prevail in patent

129. *See* U.S. CONST. art. I, § 8, cl. 1, 8.
130. *See* KSR Int'l Co., v. Teleflex Inc., 127 S. Ct. 1727, 1743 (2007).
131. *See* Jeff A. Ronspies, *Does David Need a New Sling? Small Entities Face a Costly Barrier to Patent Protection*, 4 J. MARSHALL REV. INTELL. PROP. L. 184 (2004).
132. *Id.* at 196-99; *see also* Robert E. Thomas, *Vanquishing Copyright Pirates and Patent Trolls: The Divergent Evolution of Copyright and Patent Laws*, 43 AM. BUS. L.J. 689, 703-06 (2006).
133. Ronspies, *supra* note 131, at 195.
134. *Id.*
135. *Id.* at 199-200.
136. *Id.* at 200-01.
137. *Id.* at 201-02.
138. *Id.* at 195-202; *see also* AM. INTELL. PROP. L. ASS'N, 2003 REPORT OF THE ECONOMIC SURVEY 22 (2003) (stating the median estimates for costs).
139. Ronspies, *supra* note 131, at 207-11.
140. 35 U.S.C.A. § 282 (2007).
141. Ronspies, *supra* note 131, at 207.

litigation.[142] Third, Congress can mandate small-entity litigants in patent disputes to attend arbitration, rather than pursue costly litigation.[143] Each of these suggestions would help to reduce the costly barriers for small entities, thus encouraging innovation for small businesses and independent inventors. Congress must explore these ideas because they are highly policy based determinations, outside the scope of the Supreme Court's powers.

IV. DEMAND FOR CONGRESSIONAL ACTION

Continued judicial definition of combination patent law through case law interpretation is unnecessary. The most appropriate and direct course of action is to call upon Congress to reform the non-obviousness test, rather than to synthesize historic case law under the broad umbrella of the non-obviousness standard. The Court established the broad *Teleflex* analysis for non-obviousness in the absence of any direction from Congress. However, non-obviousness analysis needs further clarification because the determination of non-obviousness involves a policy discussion more appropriately suited for the legislative branch.

One glaring opportunity for Congress to address the appropriateness of the Supreme Court's new test is in the Patent Reform Act of 2007. With the proposed legislation meeting some resistance,[144] Congress can still create a provision choosing to either: (1) codify the new broad *Teleflex* standard; (2) amend or modify the *Teleflex* standard; or (3) create a different standard depending on the outcome of the much needed policy discussion. As a starting point, and based on the previously conflicting views between the Federal Circuit and the Supreme Court, Congress simply needs to have the dialogue to determine the most appropriate analysis for non-obviousness. Then, Congress can decide which option would best serve the needs of patent law.

For an example of an alternative to the Court's test, Tamir Packin has suggested the "economic synergy" test for non-obviousness.[145] Taking a purely economic approach, Congress may consider adopting a variation of the proposed economic synergy test, which provides "that a combination should be found non-obvious if the economic value of the combination as a whole is greater than the economic value of the sum of its parts."[146] This test relies on market demands to set the economic value of inventions. "[T]he new combination cannot simply redistribute . . . in the existing demand curves, but must itself create a new demand . .

142. *Id.* at 207-08.
143. *Id.* at 210-11.
144. Harkins, *supra* note 22, at 423.
145. Packin, *supra* note 1, at 981-90.
146. *Id.* at 982.

. ."[147] The social benefit of certain mathematical calculations for value increases the efficiency of the combination patent application process.

As suggested by Pakin, the economic synergy test is superior to the Supreme Court's synergy test in three ways. First, the Court's synergy test assumes "those combinations that do not create a functional synergy are not valuable to society."[148] The economic alternative recognizes that some combinations lacking a functional synergy may still have some utilitarian value.[149] Second, the economic synergy test is inclusive of the Court's approach because "all functionally synergistic combinations will also be economically synergistic and therefore patentable."[150] Finally, the economic synergy test provides economic incentives for "inventors who create functionally simple devices that benefit society" by adding economic value.[151] In response to the criticisms of the Supreme Court's high standard of non-obviousness, the economic synergy test is one conceivable alternative addressing the call for patent reform. However, adopting this test would deviate from Supreme Court precedent requiring an abandonment of the established synergy test.

In sum, Congress must determine the appropriate test for non-obviousness by discussing different policies behind non-obviousness analysis, exploring different options and alternatives to the Court's new test, and deciding the most appropriate analysis. In light of the recent reaffirmation of the synergy test by the *Teleflex* Court, the most appropriate course of action is for Congress to address the appropriate test for non-obviousness. Legislative action would set a definitive statutory test, without forcing the Court to continuously set policy standards.

CONCLUSION

In *KSR International Co. v. Teleflex Inc.*,[152] the Supreme Court unanimously established a clear two-pronged test for non-obviousness, an essential element to obtain a combination patent.[153] The broad, high standard incorporates the policies and tests developed cautiously throughout U.S. patent law history.[154] The Court created a standard reflecting the legislative intent of Congress, while simultaneously adhering to precedent.[155] Looking to the future, the Supreme Court's interpretation of the non-obviousness doctrine in *Teleflex* will promote innovation,

147. *Id.* at 982 n.151; *see generally* MARK A. GLICK, LARA A. REYMANN & RICHARD HOFFMAN, INTELLECTUAL PROPERTY DAMAGES: GUIDELINES AND ANALYSIS 43-72 (2003).
148. Packin, *supra* note 1, at 984.
149. *Id.*
150. *Id.* (noting the consistency with the constitutional goal of promoting progress).
151. *Id.* at 986.
152. 127 S. Ct. 1727, 1741-43 (2007).
153. *Id.*
154. *See id.* at 1739-43.
155. *See id.*

while rewarding worthy inventors with exclusive patent rights.[156] Despite these steps forward, other methods remain for effectively addressing the non-obviousness standard, but it would require congressional reform outside of the scope of the judicial branch.

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156. *Id.*

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